This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Jos. Stewall &

STANFORD·VNIVERSITY·LIBRARY

English Reports
-E-
JSN
JAE
UNF
v. 1-2

~~Andrew Greenwood~~

1/4 Oct

f/ce

Jos. Sewall Jr

STANFORD·VNIVERSITY·LIBRARY

Engin
Reports
E-
JSN
JAE
UNF
v. 1-2

JSN
JAE
UNG

CASES

ARGUED AND RULED

AT

Nisi Prius,

IN THE

COURTS OF KING'S BENCH,

AND

COMMON PLEAS,

FROM EASTER TERM 33 GEORGE III.—TO HILARY TERM 34 GEORGE III.

WITH

SOME ADDITIONAL CASES,

OF AN EARLIER PERIOD.

CASES

ARGUED AND RULED

AT

Nisi Prius,

IN THE

COURTS OF KING'S BENCH,

AND

COMMON PLEAS,

FROM EASTER TERM 33 GEORGE III.—TO HILARY TERM 34 GEORGE III

WITH

SOME ADDITIONAL CASES.

OF AN EARLIER PERIOD.

BY ISAAC 'ESPINASSE,

OF GRAY'S INN, ESQ. BARRISTER AT LAW.

——Quando artibus unquam honestis
Nullus in urbe Locus, nulla Emolumenta laborum?

JUV. SAT. 3d.

FIRST AMERICAN EDITION, WITH ADDITIONAL REFERENCES.

LONDON, PRINTED:

BALTIMORE:

RE-PRINTED BY CLAYLAND, DOBBIN, & CO. FOR KEATINGE'S BOOK-STORE.

1795.

PREFACE.

IN the examples of Lord *Raymond* and Sir *John Strange*, I might find perhaps ſufficient excuſe for offering the following collection to the Public. Thoſe great and eminent men thought deciſions at *Niſi Prius* of ſufficient importance to be reported, and tranſmitted to the Profeſſion under the ſanction of their names. In the notes which they have left us, they have contented themſelves with a ſhort report of the point, as ruled by the Judge who preſided at *Niſi Prius*. From the method adopted by them I have preſumed to depart, by giving the caſe more at length. This method I have been induced to adopt, from having always found that a mere point, unaccompanied with the circumſtances of the caſe, was neither ſo ſatisfactory, intelligible or uſeful, as when the facts of the caſe were given more at large.

How important a part of profeſſional information, a knowledge of the Law of Evidence forms, every Member of the Profeſſion muſt feel:

feel: With its difficulties thoſe are well acquainted, who at an early ſtage of profeſſional experience have been called upon as part of their duty, to ſettle the evidence upon cauſes which are preparing for trial; difficulties only to be removed by a cloſe and conſtant attendance on the Courts of *Niſi Prius*, where thoſe points often occur, and are fully diſcuſſed. In this attendance few have been found to perſevere, and of the many and important points which continually occur there, which are heard, canvaſſed and decided, every report is loſt, or preſerved only as a ſolitary memorandum in a note book, devoted only to the private uſe of the compiler.

To reſcue theſe deciſions from that oblivion to which they would otherwiſe be conſigned, and to preſerve them for the benefit of the Profeſſion, is the object at which I have aimed in the following collection: at the ſame time that I feel, that fidelity in the reporting can only ſanction its reception, utility only juſtify its publication.

NAMES

OF THE

CASES REPORTED.

A.

ARTAZA v. Smallpiece *Page* 23
Aſhley v. Harriſon 48

B.

Bernard v. Reid 91
Birt v. Hood 20
Bolton v. Reichard 106
Bowman v. Nicoll 81
Buckland v. Tankard 84

C

Clarke v. Searle 25
Clipſam v. O'Brien 10
Cooper v. Marſden 1
Coore v. Callaway 115
Cowan V. Abrahams 50
Croft v. Smallwood 121

D.

De Berkon v Smith *etal.* 29
Dibdin v. Swan *et alt.* 28
Dixon v. Parkes 110
Doe *ex dem.* Parry v. Hazell 94
Doe *ex dem.* Woodmans v. Maſon 53

E.

Eaſt-India Company v. Henſley *Page* 94

G.

Girarday v. Richardſon 13

H.

Harding v. Crethorn 57
Hide v. Trent and Merſey Navigation 36
Hopkins v. Nightingale 99

I

Johnſon v. Maſon 89
Jourdaine v. Le Fevre 66

K.

Ker v. Mountain 27
Kirk v. French 79
Knibbs v. Hall 84

L.

Lambert v. Robinſon 119
Logan v. Houlditch 22

Mertens

M.

Mertens v. Winnington *Page* 121
Molton v. Cheesely 123
Morgan v. Slaughter 8
Murray v. Durand 87

N.

Naylor v. Mangles *et al.* 108
Neale v. Erving 61

P.

Philips v. Mendez da Costa 34
Same v. Same 58
Powell v. Blacket 97
Powell v. Jones 17
Pratt v. Willey 40
Puget de Bras v. Forbes and Gregory 117

R.

Randle v. Webb 38
Ratcliffe v. Pemberton 35
Rex v. Blackman 95
Rex v. Doran 127
Rex v. Doyle 125
Rex v. Eden 97
Rex v. Munton 62
Rucker v. Cammeyer 104

S.

Simpson v. Robertson *P.* 17
Sintzenick v. Lucas 43
Sheldrick v. Abery *et al.* 55
Slack v. Tibbs 42
Slipper v. Stidstone 47
Smith v. Jameson 104
Solomons v. Dawes 83
Standsfield v. Johnson 101
Stanger v. Searle 14
Stedman v. Gooch 3
Stewart v. Richman 107
Stone. v. Blackburn 37

T.

Taylor v. Brander 45
Thelluson v. Bewick 77
Thelluson v. Fletcher 73
Thompson v. Shirley 31
Thresh v. Rake 53

W.

Weedon v. Timbrell 16
Wettenhall v. Wood 18
Wilkinson v. Coverdale 75
Williams v. Shawe 93
Whitwell v. Thompson 68

Y.

Yarker v. Botham 64
Young v. Bairner 103

CASES

CASES

ARGUED AND RULED

AT NISI PRIUS

IN THE

KING'S BENCH;

EASTER TERM,

33 GEORGE III.

SITTINGS AFTER TERM,

AT WESTMINSTER.

COOPER *v.* MARSDEN.

Tuesday, May 14th.

ASSUMPSIT for money lent and advanced, with the usual counts.

Entries in the books of bankers, merchants, &c. can only be proved by the clerk by whom the entries have been made; nor is other evidence admissible, tho' such person is abroad.

To prove payment of a draft at a bankers, a clerk of the banking house was called; who produced one of the books belonging to the house, in which payment of the draft in question was entered. He was asked if the entry

page 2] was in his own hand-writing. He ſaid not; that it was the hand-writing of a perſon who had been a clerk in the houſe at the time when the draft was mentioned to have been paid, whoſe hand-writing he ſwore it was: but that that clerk was then gone to the *Eaſt Indies*, and was not likely to return.

The counſel for the plaintiff objected to the receiving of this evidence, the entry in the book not being in the hand-writing of the witneſs himſelf.

For the defendant it was contended, that this caſe was analogous to that of a witneſs to any deed, bond, or inſtrument in writing; in which caſe, if the ſubſcribing witneſs is abroad, and ſo not amenable to the proceſs of the Court, that it was the conſtant practice to allow the proof of his hand-writing as ſufficient proof of the execution of the deed, bond, or inſtrument to which his name was ſo ſubſcribed. *(a)*

Where a witneſs to any inſtrument is abroad, proof of his hand-writing is ſufficient proof of the execution of ſuch inſtrument.

Lord KENYON ſaid, That in the caſe put by the defendant's counſel, that it was the practice to admit the proof of the execution of deeds and bonds, by proving the hand-writing of the ſubſcribing witneſs, where it appeared that he was abroad; but that that was the caſe of a mere inſtrumentary witneſs, and could not govern the preſent: That the rule of evidence was clear, that entries in the books of bankers, or perſons keeping books reſpecting their trade or buſineſs, could only be proved by the clerks who had made the entries, inaſ-

(a) Coglan v. Williamſon, *Doug.* 89.

inaſmuch as they might give ſome material evidence, independent of the mere entry in the books, from having ſome acquaintance with the dealings upon which the entries were founded; whereas a mere inſtrumentary witneſs was only called to ſubſcribe his name in evidence only of the execution of the inſtrument to which he ſubſcribed it. He was therefore of opinion, that the evidence offered in this caſe was inadmiſſible; and accordingly rejected it. (*a*) page 3]

Garrow and *Ruſſel* for the Plaintiff.

Erſkine for the Defendant.

STEDMAN *v.* GOOCH.

Tueſday, May 14th.

THIS was an action of *aſſumpſit* for goods ſold and delivered: the defendant pleaded 1ſt. The general iſſue. 2dly. Coverture. Upon the firſt plea iſſue was joined, and to the ſecond was a replication, "That at the time of the cauſe of action accrued, the defendant lived ſeparate and apart from her huſband, and had from him a ſeparate maintenance." Upon which plea another iſſue was taken.

If a bill or note is drawn payable at the houſe of a third perſon, a refuſal by ſuch perſon is good evidence of the non-payment of ſuch bill or note, though he is no party to it.

The defence relied upon on the general iſſue by the defendant was, that the plaintiff in diſcharge of her bill, which was for millinary goods furniſhed to the defendant, had taken three promiſſory notes of one *Finlay* payable at the houſe of a Mr. *Browne*, and had given the defendant a receipt to that effect.

Lord

(*a*) *Salk.* 285, 690. *Eſpin. Dig.* (2*Ed.*) 142.

page 4] Lord KENYON was of opinion that it then became incumbent on the plaintiff to prove, 1ſt. that ſhe had uſed due diligence to get the money from *Finlay*, and 2dly, that he after notice, had made default in the payment.

To ſhew that ſhe had uſed due diligence to get the money from *Finlay*, the plaintiff proved that ſhe had ſent *Finlay's* notes to *Browne*, where the were made payable, and that *he* had been applied to reſpecting the payment, that in anſwer to that application he had ſaid, that he knew *Finlay*, but that he had no effects of his in his hands, nor could he pay them unleſs he had.

Mingay for the defendant objected, That theſe declarations of *Browne* were not evidence of *Finlay's* default; that they were not bills drawn upon him, which he was bound to pay, but that he was only mentioned, as his houſe was the place where the notes were to be paid.

Lord KENYON ſaid, that it was the conſtant practice to make country bank bills and notes payable at certain houſes in *London*, and though the perſons at whoſe houſes they were payable were not parties to them, nor perſonally liable, yet that an anſwer at ſuch houſes as to the payment or non-payment of the bills or notes made payable there, was ſufficient. He therefore held *Browne's* declaration, to be admiſſible evidence of the probable non-payment of the notes in queſtion. (*a*)

To

(*a*) 1 *Stra.* 416. 2 *Stra.* 910. 1 *Term Rep.* 169.

To prove notice to this effect to *Finlay*, the plaintiff called a witness who proved, that she carried a letter from the plaintiff to *Finlay*, inclosing the notes and informing him that they were returned as not being likely to be paid: that she went to the house where *Finlay* lodged for the purpose of delivering the letter to him: that she enquired for him from the woman who kept the house, and was informed that he was not at home: that she then left the letter inclosing the notes with this woman, and that the next morning the letter and bills were thrown into the plaintiff's house by some persons unknown. His Lordship was of opinion that this was sufficiently presumptive proof that the letter had come to *Finlay's* hands, and therefore allowed it to be read. It was to the effect stated by the witness. (a)

A letter delivered at the house of a person who has paid away a bill or note informing him of the non-payment is sufficient notice.

It was then objected by the counsel for the defendant, That it appeared, that these notes had been returned before they were payable, and that the plaintiff having taken them in discharge of her debt, for goods sold, could not maintain an action on her original debt for the goods, until an actual default in the payment of these notes given in discharge of it, as the notes might be paid when they became due, nor should the plaintiff be allowed to judge of the probable or improbable ability of the party to pay at a future day.

If a person in payment of a debt gives a bill or note which has some time to run, the party receiving it cannot sue on his original debt, until the time which such bill or note has to run is expired. *Aliter* if such bill or note was of no value.

Lord KENYON over-ruled the objection. He said, that to this effect the law was clear, that if in payment of a debt the creditor is content to take a bill or note payable at a future

(a) 1 *Term Rep.* 167.

ture day, that he cannot legally commence an action on his original debt, until such bill or
page 6] note becomes payable or default is made in the payment; but that if such bill or note is of no value, as if for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor on it. (a)

In proof of the issue arising on the second plea, "that the defendant lived separate and apart from her husband, and had from him a separate maintenance," *Erskine* for the plaintiff stated, that the evidence he had to that effect was, first a sentence of the ecclesiastical court by which the defendant and her husband were separated; and 2dly, as to the separate maintenance that he would prove, that she recived from her husband a regular annuity of 200 *l. per ann.* payable at a banking house in *London*.

How far the sentence of the spiritual court is sufficient evidence of a separation.

To prove the separation he produced and proved the *sentence* of the Spiritual Court, by which a divorce *a mensa & toro* was pronounced between the parties.

Mingay objected that the production of the sentence alone was not sufficient evidence, that the libel and all the procedings in that Court should likewise have been produced.

Lord KENYON seemed disposed to be of opinion, that the sentence alone was sufficient, but reserved the point. (b)

In

(a) 1 *Term Rep.* 405. (b) *Park. Inf.* 410.

In proof of the ſeparate maintenance, the plaintiff called the clerk of Meſſrs.—'s banking houſe: he ſwore that that houſe by the direction and on the account of Mr. *Gooch* the huſband of the defendant, paid her 200 *l. per ann.* quarterly. He was aſked if this payment was made in conſequence of Mr. *Gooch's* verbal directions, if the witneſs knew of any deed by which the payment of that ſum was ſecured to her; he anſwered, that he knew of no ſuch deed. Upon wich *Mingay* objected, that this evidence was inſufficient to ſupport this part of the iſſue: that in this action the wife was to be charged as a feme ſole: that a feme covert had been ſo charged by reaſon of her ſeparate maintenance being property ſubject to no controul from the huſband, but excluſively her own: that in the preſent caſe what was paid to the defendant might be a mere gratuity revokable at pleaſure, and not a property independent of the huſband, by reaſon of which only ſhe could be charged with her own debts: that in all caſes of ſeparate maintenance which had come before the Court, the huſband had ſecured by the intervention of truſtees a ſeparate maintenance to his wife, by which means only ſhe could take from him a ſeparate and indipendent property. He therefore relied, that as no deed appeared in this caſe, that the defendant could not be deemed to have ſuch a ſeparate maintenance in law, as ſhould ſubject her to the payment of her own debts. (a) page 7]

A ſeparate maintenance muſt be reſerved to the wife by deed, in order to make her liable to her own debts.

Lord KENYON was of opinion, that it was neceſſary that the ſeperate maintenance ſhould be

(a) *Corbet v. Polnitz*, 1 *Term Rep.* 5.

be ſecured by deed; but as the point had never been expreſsly decided, his Lordſhip reſerved it.

Erſkine and *Marryatt*, for the Plaintiff.

Mingay for the Defendant.

page 8] In the next term the two points ſo reſerved came on before the Court, when the other Judges ſeemed to concur in opinion with Lord *Kenyon*, but no Judgment has been given.

MORGAN *v.* SLAUGHTER.

Wedneſday, May 25th.

Covenant in a leaſe not to aſſign or underlet without leave of the landlord in writing is a fair and uſual covenant.

THIS was an action of *aſſumpſit* brought to recover the penalty of 50*l.* for breach of an agreement.

The agreement ſtated in the declaration was "That the defendant had agreed to aſſign to the plaintiff all his intereſt in a leaſe of a public houſe, of which 13 years were unexpired, and his good-will in the trade and buſineſs carried on in it, in conſideration of 200*l.* and it was further agreed, that the leaſe ſhould contain *none but fair and uſual covenants*; and each party bound himſelf to the performance under a penalty of 50*l.*" (a)

The facts of the caſe were; that the defendant was poſſeſſed of ſuch a leaſe and for the time mentioned; but not having the leaſe by him at the time he entered into the agreement ſtated in the declaration, he had made it part of

(a) 3 *Wilſ.* 234, 2 *Term, Rep.* 425. *Dumpors Caſe*, 4 *Co.* 119.

of the agreement, that when the leaſe came to be aſſigned, it ſhould be found to contain none but fair and uſual covenants.

The breach aſſigned in the declaration was [page 9] "That the leaſe did contain a certain covenant," *viz* "That the leſſee ſhould not alien, aſſign, or under-let the premiſes or any part of them, without leave of the leſſor in writing for that purpoſe firſt had and obtained:" and then averred, that this was not a fair and uſual covenant, and ſo that the defendant could not perform his agreement.

The counſel for the defendant inſiſted, that the covenant was a fair and uſual one adopted in all leaſes, from the times of which there are any reports, and cited to that effect *Dumpor's* caſe, 4 *Co.* 119. where a queſtion aroſe on this very covenant, "Whether the leſſor having once permitted an aſſignment, had not for ever diſpenſed with the covenant."

For the plaintiff—*Mingay* relied on the caſe of *Henderſon* v. *Hay*, 3 *Brown's Caſ. Chanc.* where on a bill filed for the ſpecific performance of an agreement to make a leaſe containing the fair and uſual covenants, *Thurlow* Lord Chancellor was of opinion, that the covenant in queſtion, was not of that deſcription.

Lord KENYON ſaid, he could not entertain a doubt concerning this being a fair and

uſual covenant.— That it was a fair covenant as providing properly for the intereſt of the party demiſing, and as to it's being a uſual one, that it ſufficiently appeared to have been a uſual one ſo long ſince as the caſe cited by the Defendant's counſel, and that he had never ſeen a leaſe properly drawn without it. That the Plaintiff had therefore no cauſe of action, as the covenant was a
page 10] fair and uſual one, and the Defendant had always been ready to aſſign the leaſe, in purſuance of the agreement. His Lordſhip therefore directed a nonſuit.

Mingay and *Shepherd* for the Plaintiff.

Erſkine and *'Eſpinaſſe* for tht Defendant.

Saturday, May 18th.

In an action againſt the maker of a note letters of he indorſer are not admiſſible evidence to impeach the indorſee's title though the indorſement was made after the note was payable.

CLIPSAM *v.* O'BRIEN.

ASSUMPSIT on a promiſſory note by the indorſer againſt the maker.

Erſkine for the defendant when the cauſe was called on, ſtated his defence to be— That the note in queſtion had been made by the defendant payable to one *Withy*, that *Withy* had indorſed it to one *Stamford*, and *Stamford* to the plaintiff, but that the laſt indorſement from *Stamford* to the plaintiff had been made after the note was payable. He ſaid, That as this circumſtance enabled him to

to go into any equitable circumſtance of defence which he might have had againſt the original parties to the note; that he had evidence to invalidate the tranſaction under which the plaintiff became poſſeſſed of the note, but that for that purpoſe, it would be neceſſary for him to uſe *Stamford* the indorſer's letters, and the only queſtion was, Whether the letters of the indorſer were admiſſible evidence to impeach the indorſee's title to a note, under the above circumſtances, in an action againſt the maker. page 11

Lord KENYON was clearly of opinion that he could not.

Garrow and *Baldwin* for the Plaintiff.

Erſkine for the Defendant.

DOE *ex dem.* DAVIDSON Executor *v.* BARNARD Aſſignee of TIMMINGS a Bankrupt. *Same day*

THIS was an ejectment by the executor of the mortgagee againſt the aſſignees of the mortgagor, to recover poſſeſſion of the mortgaged premiſes. What ſhall be uſury where the money lent is in the form of ſtock in the public funds.

The plaintiff proved the execution of the mortgage deed by *Timmings* the bankrupt, and

and the payment of the consideration money and there rested his case.

The defendants relied, that the loan of the money was on an usurious transaction, and that so all the securities were void under stat. 12 *Ann. c.* 16, and that the plaintiff could not therefore claim under the mortgage deed.

page12] To prove this case they called *Timmings* the bankrupt, he having released: he stated, that having occasion for a sum of money before his banktruptcy, that the applied to—— the mortgagee, now deceased: that the mortgagee said, that all his money was in the funds, and that to sell out stock at that time would be a considerable loss, stock then standing at 73, but that if *Timmings* would take it at 75 that he should have the sum he wanted. *Timmings* then stated, that he consented to take the money on those terms, and that he received 1500 *l.* in stock valued at 75: that he sold out the same day, and that it produced but 72 1-4 by which he lost between 50*l.* and 60*l.*

A broker was called, who proved that 72 1-4 was the current price on the day on which the stock was so sold out.

Lord KENYON held the transaction to be clearly usurious, and nonsuited the plaintiff.

Bower and —— for the Plaintiff.

Bearcroft for the Defendant.

GIRARDY *v.* RICHARDSON. [page 13

Wednesday, May 30th.

Assumpsit for use and occupation will not lie where the premisses are let for an illegal purpose, or what is *contra bonos mores.*

ASSUMPSIT for use and occupation of certain rooms belonging to the plaintiff.

For the defendant it was proved, that she was a woman of the town: that the rooms had been let to her by the wife of the plaintiff, who it was proved, managed the business of his house, in letting the lodgings: that at the time of letting them, she was informed of the defendant's mode of life, and consented that she should be at liberty to receive male visitors for the purpose of prostitution.

Lord KENYON ruled, that under these circumstances the action was not maintainable: That the contract upon which it was attempted to be sustained was *contra bonos mores*, and therefore could not support an action. His Lordship therefore directed a verdict for the defendant.

Erskine for the Plaintiff.

Garrow for the Defendant.

page 14]

Same day.

STANGER *v.* SEARLE.

How far the evidence of a clerk of the post-office whose business it is to detect the forgery of franks is admissible,

THIS was an action against the defendant as acceptor of a bill of exchange.

The defence set up by the defendant, was, that the hand-writing subscribed to the bill, purporting to be his acceptance, was a forgery.

Two witnesses on the part of the plaintiff proved the hand-writing of the defendant, and swore that they believed it to be his.

To encounter this testimony, the defendant called a clerk of the post-office, whose business it was to detect the forgery of franks. He was previously asked by the plaintiff's counsel; if by the bare inspection of a hand-writing he could pretend to ascertain, whether it was a real or an imitated one? He said (that except in very few cases) he could only do it by comparison of hands, or by knowing the party's hand-writing. It was admitted that he did not know the defendant's handwriting.

Evidence of hand writing from comparison of hands is not admissible:

Erskine for the defendant then offered to produce other bills of exchange accepted by the defendant, and which were proved to be his hand-writing, for the purpose of comparing them. This was objected to by the plaintiff's counsel, as it did not appear which was the real hand-writing of the defendant, those

those bills, or those upon which the action was brought, both being proved by witnesses; and that it was besides, judging from a comparison of hands. [page 15

Lord KENYON ruled, that the witness should not be allowed to decide on such comparison of hands.

A witness shall not be admitted to prove a writing not to be a party's hand-writing from only having seen such party write in his presence, while the action was depending.

It was then said by the defendant's counsel, that the witness had seen him write his name several times: being asked to the circumstance, he said, that previous to the trial the defendant had so written his name, for the purpose of shewing to the witness his true manner of writing it, that the witness might be able to distinguish it from the pretended acceptance to the bill in question.

His Lordship told him, that he should not permit that to influence his judgment, as the defendant might write differently from his common mode of writing his name, through design.

He was then asked, Whether by the bare inspection of the hand-writing subscribed to the bill, he having no knowledge of the defendant's hand-writing, except as he had stated, he could determine whether it was his hand-writing, or a forgery? He answered in the negative. Upon which his testimony was rejected.

Mingay and *Const* for the Plaintiff,

Erskine for the Defendant.

Vid. Good title *ex dem. Revett* v. *Braham*. 4 Term Rep. 497.

page 16] SITTINGS AFTER TERM, AT GUILDHALL.

Monday May, 27th.

WEEDON *v.* TIMBREL.

Where the husband and wife live in a state of separation, an action of crim. con. cannot be maintained.

THIS was an action for criminal conversation with the plaintiff's wife.

It was proved that the plaintiff having some suspicion of his wife's misconduct, had taken a lodging for her, for which and for her board he paid; and that at the time when the adultery was committed, they lived in a state of separation.

Lord KENYON ruled at the trial, that as the ground of this action was the depriving the husband of the society and comfort from the company of his wife, *that if they lived in a state of separation when the offence was committed, that the action could not be maintained.* He therefore directed the plaintiff to be nonsuited.

Garrow Shepherd and *Reader* for the Plaintiff.

Erskine for the Defendant.

Vid. s. c. 5 Term R.

In the following Term a new trial was moved for in this case; and the Court of *King's Bench* concurred in his Lordship's direction.

SIMPSON *v.* ROBERTSON. page 171

Same day.

IN an action for goods ſold and delivered— Part of the demand was for cloths furniſhed to the ſon of the Defendant, by the Plaintiff, who was a taylor.

Lord KENYON ſaid, he had ruled before, that if a tradeſman colludes with a young man, and furniſhes him with clothes to an extravagant degree, that though the father might have been liable, had they been to a reaſonable extent, that the tradeſman who gives credit to ſuch an extravagant degree, ſhall not at law be allowed to recover.

Mingay and *Alderſon* for the Plaintiff.

Bearcroft for the Defendant.

POWELL *v.* JONES.

Wedneſday, May 29th.

THIS was an action againſt the Defendant as the acceptor of a bill of exchange, drawn from *Dominica*.

It is not a ſufficient acceptance of a bill of exchange to ſay; "There is your bill, it is all right."

The Defendant pleaded the general iſſue, and relied that he had never accepted the bill in queſtion.

page 18] The acceptance, as proved by the witneſs on the part of the Plaintiff, was in this manner: The bill was left with the Defendant for acceptance by the Plaintiff's clerk; the next day he called for the bill, when the Defendant returned it, ſaying, "There is your bill, " it is all right." This the counſel for the Plaintiff contended was a ſufficient parol acceptance to bind him.

Lord KENYON ruled, that theſe words could by no implication amount to an acceptance; that they conveyed no evidence of the Defendant's intention to bind himſelf to the payment of the bill at all events, which was neceſſary for the purpoſe of charging him as acceptor, He therefore directed the Plaintiff to be called.

Erſkine and *Marryat* for the Plaintiff.

Mingay for the Defendant.

Same day

WETTENHALL *v.* WOOD.

Money lent to play with, without any ſecurity, recoverable in *aſſumpſit.*

IN an action for money lent, the defence was; the Plaintiff kept a common gambling houſe: that the Defendant being there at play with ſeveral other perſons, and having loſt all his money, applied to the plaintiff for the loan of ſome money for the purpoſe of continuing the play, when the plaintiff lent him the ſum for which the preſent action was brought.

Garrow

Garrow for the Defendant objected, that [page19
this being money lent knowingly to game with, was not recoverable.

Lord KENYON was clearly of opinion that it was recoverable; for that the ſtat. of 9 *Ann.* 14. only avoided *ſecurities* for money lent to play with, and did not extend to caſes of mere loans without any ſecurity taken. He therefore directed a verdict for the Plaintiff.

Erſkine and——for the Plaintiff.
Garrow for the Defendant.

END OF EASTER TERM, IN THE KING's BENCH.

page 20]

IN THE COMMON PLEAS, AT WESTMINSTER.

SAME TERM.

If a witness is called to prove that he himself is liable to the demand for which the action is brought, the Plaintiff by suggesting that he is a partner, cannot deprive the party of his testimony

BIRT *v.* HOOD.

ASSUMPSIT for goods sold and delivered. The defence set up on the part of the Defendant was, that the business in the course of which the goods had been furnished, was carried on by his mother; that they were for her use, and on her credit, and not on account of the Defendant, who merely worked in the business. The Plaintiff admitted that the mother did carry on the business, but insisted that the Defendant was a partner with her, and that not having pleaded the matter in abatement, he might now be sued alone.

To prove the Defendant's case, the mother was called.

Adair Serj. objected to the admission of her testimony, inasmuch as being a partner, and therefore liable to contribution in case the plaintiff recovered in this action; that it there-

fore

fore became her intereſt to defeat it, and ſo [page 21
rendered her incompetent: at all events that ſome witneſs ſhould be called to prove that no partnerſhip in fact ſubſiſted between the Defendant and her.

EYRE Chief Juſtice over-ruled the objection. He ſaid, that as the Plaintiff had choſen to proceed againſt the Defendant ſolely, that he ſhould not then be allowed by ſuggeſting merely the exiſtence of a partnerſhip between the Defendant and the witneſs, to deprive the Defendant of the benefit of her teſtimony particularly where the effect of her teſtimony was to make herſelf liable.

Adair Serj, for the Plaintiff.

Bond Serj. for the Defendant.

Vid. poſt. Young v. *Bruiner. Hillary* Term 34. *Geo.* 3. where the partnerſhip being admitted, it was ruled by Lord KENYON that a partner could not be a witneſs, though the effect of his teſtimony was to charge himſelf.

CASES

ARGUED AND RULED

AT NISI PRIUS

IN THE

KING'S BENCH;

TRINITY TERM,

33 GEORGE III.

FIRST SITTING IN TERM,

AT WESTMINSTER.

Wednesday, June 5th.

LOGAN *v.* HOULDITCH, & alt.

A demand in writing left at the Defendant's house, is sufficient in trover.

TROVER for a carriage and harness. To prove the demand, a witness was called for the Plaintiff, who produced a paper a copy of which he had served on one of the Defendants at his house. This was a demand in writing of the things for which the action was brought, signed by the plaintiff. There being

being ſome doubt as to the perſon upon whom the demand was ſerved, whether he was one of the Defendants or not :—

Lord KENYON ſaid, that a demand in writing, ſuch as the preſent, *left at the houſe of the Defendant*, was a ſufficient demand to ſupport that part of the evidence neceſſary in this action.

Erſkine and *Baldwin* for the Plaintiff.

Garrow for the Defendant.

FIRST SITTING AT GUILDHALL.

ARTAZA *v.* SMALLPIECE.

Thurſday, June 6th.

When goods are ſhipped to the order of the ſhipper, the cuſtom of charging the perſon in whoſe name goods are entered at the Cuſtom-Houſe, with the freight, can only exiſt where the ſame perſon is conſignee, or where the conſignee is unknown.

THIS was an action of *aſſumpſit*, brought to recover the amount of the freight of 170 cheſts of oranges and lemons.

The goods had been ſhipped in a general ſhip from *Portugal*, and the bill of lading was *to the order of the ſhipper*. The goods had been entered

page 24] entered at the Cuſtom-houſe in the name of the Defendant, and it was proved, that in general, where goods are ſo ſhipped to the order of the ſhippers, that the perſon in whoſe name the goods are entered at the Cuſtom-houſe, was conſidered as liable to the freight; upon which principle the preſent action had been brought.

To prove this caſe, a witneſs was called on the part of the Plaintiff, who proved the bill of lading, and the entry at the Cuſtom-houſe, to have been made in the name of the Defendant; but in the courſe of his examination it appeared, that the Defendant had bought them of one *Haynes*, to whom the bill of lading had been indorſed and ſent by the ſhipper, which circumſtance was known to the Plaintiff.

Upon this evidence it was contented by *Mingay* for the Defendant, that the action ſhould have been brought againſt *Haynes*, not againſt the Defendant: that *Haynes* was the conſignee, and in that character liable to the freight; and that the cuſtom of making him liable in whoſe name the goods were entered at the Cuſtom-houſe, could only take place where ſuch perſon was in fact the conſignee, or where the conſignee was not known.

Per Lord KENYON, The captain has a right to retain the goods ſhipped on board his veſſel till he is paid his freight: if he parts with the poſſeſſion of them, he muſt then reſort to his contract. In the caſe of goods con-

consigned, the consignee is the person liable to the freight, not the person to whom he sells them: that would be to enhance the price on him, as he must be supposed to buy them at a certain price independent of all charges, unless such charges are made part of the bargain. A right of action cannot be transferred from the person liable, to another by such person's own act. He therefore who is first liable must remain so. Here *Haynes* was the consignee, and known to be such to the plaintiff, who cannot, by any supposed custom, transfer the liability to the defendant who is only the purchaser of the goods from him. I am therefore of opinion the Plaintiff must be called. [page 25

Erskine and ——— for the Plaintiff.
Mingay for the Defendant.

SECOND SITTING IN TERM, AT WESTMINSTER.

CLARKE *v.* SEARLE.

Monday, July 30th.

THIS was an action of debt brought to recover the penalty of 100 *l.* given by statute 25 *Geo.* 2. *c.* 26, *s.* 2. against any person who shall keep a house for public dancing, music, or other public entertainment within

Statute 25 Geo. 2. c. 26. extends to houses kept for the purpose of private dancing, not to public place only.

page26] the city of *Weſtminſter*; ſuch houſe not having been licenced in purſuance of the directions of the ſtatute.

It was proved on the part of the Plaintiff that the Defendant was the proprietor of an houſe where perſons of both ſexes met to amuſe themſelves by dancing: that they paid for their admiſſion, and that there were no performers who exhibited, but that the company danced for their own amuſement.

Garrow for the Defendant objected that this caſe ſo made out for the Plaintiff was not within the ſtatute, and that he therefore could not recover: That the ſtatute was levelled againſt houſes only where public dancers were kept for the purpoſe of exhibiting as performers, ſuch as *Sadlers Wells*, *The Circus*, and other ſuch places of public reſort; not to places where the parties meet for the purpoſe of amuſing themſelves, or of improvement in the accompliſhment of dancing.

Lord KENYON over-ruled the objection.—He ſaid, the words of the ſtatute were general, "any houſe kept for public dancing." There could be no doubt that this houſe was of that deſcription, inaſmuch as any perſon paying for his ticket would be admitted. Beſides, that the act of Parliament in queſtion having been made to regulate all places of public reſort, that an houſe of the deſcription of the Defendant's was equally an object of

regu-

regulations by the magiſtrates as any other; as ſuch places, if not properly regulated, became the reſort of the vicious and profligate of both ſexes.—The jury found a verdict for the penalty.

Erſkine and *Conſt* for the Plaintiff.
Garrow for the Defendant.

SITTINGS AFTER TERM, AT WESTMINSTER.

[page27

KER *v.* MOUNTAIN.

Thurſday, June 20th.

IN this caſe, which was an action againſt the Defendant as proprietor of a ſtage coach it was ruled by Lord *Kenyon*, That if a perſon takes a place in a ſtage coach and pays at the time, only a depoſit, as half the fare for example, and is not at the inn ready to take his place when the coach is ſetting off, that the proprietor of the coach is at liberty to fill up his place with another paſſenger; but if at the time of taking his place he pays the whole of the fare, in ſuch caſe, the proprietor cannot diſpoſe of his place, but he may take it at any ſtage of the journey he thinks fit.

A perſon paying the whole fare of a ſtage coach, may take his place at any ſtage of the journey, *aliter* if he pays only a depoſit.

Garrow, *Park* and *Nolan* for the Plaintiff.
Erſkine and *Reader* for the Defendant.

Tuesday. June 25th.

DIBDIN *v.* SWAN and BOSTOCK.

The editor of a public newspaper may fairly comment on any place of public entertainment, nor shall such a paragraph be deemed a libel.

THIS was an action against the Defendants for a libel.

The Plaintiff was the proprietor of a place of public entertainment, called *Sans Souci*. where he sung and performed certain songs which were supposed to be written and composed by himself.

The Defendants were the editor and the printer of a public newspaper called the *World*. The libel for which the action was brought, was a paragraph which appeared in that paper, insinuating, that the songs were not in fact written by the plaintiff, but a person of the name of *Bickedstaff*, with whom the plaintiff had formerly been connected in bringing out several musical pieces, which had been performed with a considerable share of public applause. The paragraph further mentioned that on the first night of the performance, there had been a very thin audience, and that composed of persons admitted under orders: that the music of the songs was of very inferior composition, and that the applause bestowed on the performance was only from the persons who had so gained admittance; whereas the songs both as to the words and music, were the composition of the plaintiff only, there was a very full audience; and the applause was genuine and from persons no way connected with the plaintiff.

Lord

Lord KENYON ſtated the law on this ſubject to be—That the editor of a public newſpaper may fairly and candidly comment on any place or ſpecies of public entertainment, but it muſt be done fairly and without malice or view to injure or prejudice the proprietor in the eyes of the Public. That if ſo done, however ſevere the cenſure, the juſtice of it ſcreens the editor from legal animadverſion, but if it can be proved that the comment is unjuſt, is malivolent or exceeding the bounds of fair opinion, that ſuch is a libel, and therefore actionable. [page 29

Mingay and *Lambe* for the Plaintiff,
Erſkine for the Defendants.

DE BERKOM *v.* SMITH and LEWIS. *Wedneſday, June 26th.*

ASSUMPSIT to recover the value of a quantity of foreign lace againſt the Defendants charging them as partners.

A partnerſhip may exiſt in a particular concern, which ſhall charge the parties to engagements only connected with ſuch concern.

It was admitted that *Smith* one of the Defendants was liable, but the other Defendant *Lewis* denied that he was a partner. This was the only queſtion in the caſe.

The evidence on the part of the Plaintiff was, That he was a foreigner living at *Liſle* in

page30] in *Flanders*: that having been applied to by the defendants for a quantity of lace on credit, that before he would furniſh it; he wrote over to his correſpondent in *London* to enquire concerning their circumſtances and ſituation: that his correſpondent had enquired from a Mr. *Botham* a merchant in *London*, who informed him that they were in partnerſhip in trade, which information the correſpondent communicated to the Plaintiff, who in conſequence thereof gave them the goods on the terms they aſked.

Mr. *Botham's* clerk was called, and proved That the only connection in trade between Mr. *Botham* and the Defendants was in diſcounting bills, which Mr. *Botham* had been in the habit of doing for *Smith* one of the Defendants, but that on diſcounting a bill at one time for *Smith*, that he had introduced *Lewis* to him as his partner.

Lord KENYON upon this evidence ruled that it was not ſufficient to charge *Lewis* as a partner. His Lordſhip ſaid, that perſons might be partners in a particular concern or buſineſs but that notwithſtanding if they did not appear to the world as partners, that it ſhould not be ſufficient to conſtitute a general partnerſhip and make them liable in other caſes not connected with ſuch particular buſineſs. That the circumſtance in evidence of the introduction of *Lewis* to *Mr. Botham* ſhould be taken *ſecundum ſubjectam materiam* that is, as applying to the tranſaction in which *Smith* was

was concerned with Mr. *Botham*, the diſcounting of bills, to which tranſaction only it ſhould be confined, and that he was therefore of opinion, that without further evidence a general partnerſhip could not be eſtabliſhed, in order to charge *Lewis* the other Defendant in this action. [page 31

It afterwards however appearing in evidence, that in fact *Lewis* had repreſented himſelf to the Plaintiff, as partner in trade with *Smith*: his Lordſhip in his charge to the jury added, that though in point of fact parties are not partners in trade, yet if one ſo repreſents himſelf, and by that means gets credit for goods for the other, that both ſhall be liable.

The Plaintiff recovered.

Erſkine and *W. Beſt* for the Plaintiffs.

Bower for the Defendants.

SITTINGS AT GUILDHALL, AFTER TERM.

THOMPSON Aſſignee of ABRAHAMS a Bankrupt *v.* SHIRLEY and BODY.

Friday, June 21ſt.

A demand of payment for goods, for which an action of trover is brought, is a good demand to ſupport the action.

TROVER by the Plaintiff as aſſignee of one *Abrahams* a bankrupt for a quantity of paper, part of the bankrupt eſtate, of which the Defendant had poſſeſſed himſelf.

Abrahams

page 32] *Abrahams* the bankrupt was a ſtationer, and had been in the habit of diſcounting the bills of one *Caſton* with the Defendants, on which occaſions he had uſually put his own name on the back of them. Several of theſe bills being unpaid, and finding himſelf unable to diſcharge them, at a time when from the general ſtate of his affairs he knew he muſt become a bankrupt, he was prevailed upon by the Defendants to give them an order to receive on his account, but for their own uſe, a quantity of paper which was then coming to the bankrupt; under which order on the 3d of *January* 1793. they obtained poſſeſſion of the paper; and the preſent action was brought to recover it, on the ground of undue preference.

The demand was in writing, in the following words:—

"Gentlemen,

"I am directed by the aſſignees of JOHN ABRAHAMS, a bankrupt, to write to you for payment of the ſum of 781 l. 5 s. the amount of paper belonging to his eſtate which I underſtand you have diſpoſed of; and unleſs the ſame be immediately paid me, I have inſtructions to take the neceſſary meaſures to inforce it.

5th Feb. 1793. I am, &c.

To Meſſrs. Shirley and Body, Warwick Lane. *William Bennett*, Plaintiff's Attorney.

Bower for the Defendants objected that [page 33
this letter, which was the only evidence of the demand, would not ſupport the action, inaſmuch as it was not a demand of the ſpecific things for which the action was brought which he contended was neceſſary in an action of trover, but of payment for them. That a demand of payment was affirming the contract, and therefore could not ſupport an action of trover, which was founded on a wrong and ſuppoſed a tortious converſion.

Lord KENYON over-ruled the objection, and held the demand to be good. He ſaid that the demand in trover was only for the purpoſe of giving the Defendants an opportunity of either reſtoring the goods in ſpecie or of making a ſatisfaction to the party to whom they belonged; and that a demand of ſatisfaction had been held to be good in an action of trover. That the demand in the preſent caſe muſt be taken to be of that deſcription, and not as affirming any pretended ſale of them. And as the letter mentioned that the Defendants had diſpoſed of them, the Plaintiff could not demand the ſpecific goods, but a ſatisfaction only, upon the receiving of which no action would be brought.

Erſkine and——for the Plaintiff.

Bower for the Defendant.

Vid. Rookebey's caſe, *Clayt.* 122. where a demand of ſatisfaction in terms, was adjudged to be a ſufficient demand in an action of trover.

page 34]

Tuesday, July 2d. PHILLIPS *q. t. v.* MENDEZ DA COSTA.

In debt on the Lottery Act the plaintiff shall recover no more penalties than he has sworn to in his affidavit to hold the defendant to bail.

DEBT *qui tam* on the Lottery Act, to recover several penalties for insuring numbers in the State Lottery against the statute.

The declaration consisted of twelve counts, for the insuring of so many numbers particularly mentioned, in the Lottery, and went to recover distinct penalties for each number.

Garrow for the Defendant produced the affidavit under which the Defendant had been held to bail under the statute, which affidavit was sworn to one offence only, and insisted that the Plaintiff should be limited to go for one penalty only, arising under the single offence so sworn to, and cited a case of *Israel q. t.* v. *Hart*, in which on a similar occasion Lord KENYON had so ruled it.

His Lordship continued of the same opinion and ruled in the present case that the Plaintiff should be confined to one penalty only.

Bearcroft and *Shepherd* for the Plaintiff.

Garrow for the Defendant.

RATCLIFF *v.* PEMBERTON.

Same day

In an action of covenant, under the general issue, the Defendant shall not be allowed to give in evidence what amounts to a licence.

COVENANT on the charter party of the ship——, from——to *Newry* in *Ireland*. The action was brought to recover the demurrage settled by the charter party, which was at 1 *l. per diem*, and the declaration stated that the vessel was to be discharged by a certain day mentioned in the charter party, whereas she had been detained twelve days beyond the time so limited for her clearance whereby the Plaintiff became entitled to 1 *l. per diem* demurrage for that time. The Defendant pleaded the general issue.

The case relied on, on the part of the Defendant, was, that the Plaintiff (who was master and owner of the ship) had waived all claim to demurrage, he having consented that the time should be enlarged within which the cargo was to be discharged, and offered evidence to prove that the Defendant, who was the consignee, could have discharged the cargo by the time limited, but that the Plaintiff gave him leave to take out the cargo at his leisure, as he (the Plaintiff) was waiting for a freight.

The Plaintiff's counsel objected to the receiving of this testimony, as the Defendant had put the general issue only on the record, whereas the present defence set up was a collateral matter which went to discharge the breach, and amounted to a licence, which should have been specially pleaded.

Lord

page 36] Lord KENYON was of this opinion, and held the evidence to be inadmiſſible on the record as it then ſtood. His Lordſhip ſaid that every party ſhould be fairly appriſed by the pleadings what queſtion he came to try. That in the preſent caſe, the licence and acquiſcence of the Plaintiff, that the time for diſcharging the cargo ſhould be enlarged was a good and legal defence againſt any claim for demurrage, but that the Plaintiff ſhould have known that the Defendant meant to rely on that matter in his defence. That all that appeared on the face of the pleadings was a denial of the Plaintiff's claim of demurrage, whereas the defence confeſſed and avoided it; and therefore it ſhould have been ſpecially pleaded.

The counſel for the Defendant deſired his Lordſhip to make a note of the point; but a new trial was never moved for.

Erſkine and *Baldwin* for the Plaintiff.

Law and *Marryat* for the Defendant.

Wedneſday July 3d.

HIDE *v.* Proprietors of the TRENT and MERSEY Navigation.

How far a common carrier may diſcharge himſelf from the duties impoſed on him by law.

IN an action againſt the Defendants as common carriers. *Per* Lord KENYON, There is a difference where a man is chargeable by law generally, and where on his own contract. Where a man is bound to any duty, and chargeable

able to a certain extent by the operation of law, in such case, he cannot by any act of his own discharge himself. As in the case of common carriers, who are liable by law in all cases of losses, except of those arising from the act of God, or of the King's enimies: they cannot discharge themselves from losses happening under these circumstances by any act of their own, as by giving notice, for example to that effect. But the case is otherwise, where a man is chargeable on his own contract: there he may qualify it as he thinks fit. [page 37

STONE *v.* BLACKBURN.

Same day.

CASE for negligently managing the Defendant's vessel in the *Thames*, whereby the Plaintiff's lighter was damaged.

An objection to the competency of a witness may be made at any stage of the cause.

After the witnesses on the part of the Plaintiff had been examined in chief and cross examined, it was discovered that they were interested, and should have been released, which had not been done.

Mingay contended, that after having been examined and cross examined, that the objection came too late.

Per Lord KENYON. This is an objection to their competency; and objections to the competency

page 38] petency of witneſſes never come too late, but may be made at any ſtage of the cauſe.

Erſkine for the Defendant.

HOME CIRCUIT,

SUMMER ASSIZE, 1793.

AT CHELMSFORD,

CORAM BULLER JUSTICE.

RANDLE *v.* WEBB.

If in anction of aſſault the day is material, and the Defendant pleads *ſon aſſault*, the Plaintiff muſt new aſſign.

IN an action of aſſault, the Defendant pleaded *ſon aſſault demeſne* upon which plea iſſue was joined.

The aſſault laid in the declaration was on the 28th of *June*, on which day the aſſault for which this action was brought was really committed.

The counſel for the Defendant began: and they proved an aſſault committed by the Plaintiff on the Defendant, on the 27th of *June*, and there reſted their cauſe.

The counſel for the Plaintiff would then have proved an aſſault by the Defendant on the

the Plaintiff, on the day laid in the declaration, (the 28th of *June*) which they contended was not anſwered by the Defendant on his plea of *ſon aſſault*, by proving an aſſault on the 27th. But it was ruled by Mr. Juſtice *Buller*, that the day laid in the declaration being immaterial, the Defendants proving *ſon aſſault* on any day previous to the bringing of the action; was a compleat anſwer to it; for that if the Plaintiff had intended to have made the day material, that he ſhould have new aſſigned it. [page39

Bond Serj. and *'Eſpinaſſe* for the Plaintiff.
Garrow and *Marryat* for the Defendant.

END OF TRINITY TERM,

33. GEORGE III.

CASES

ARGUED AND RULED

AT NISI PRIUS

IN THE

KING'S BENCH;

MICHAELMAS TERM,

34 GEORGE III.

FIRST SITTINGS IN TERM.

Nov 11th, 1793.

PRATT *v.* WILLEY.

What is usury in discounting a bill where part is given in goods.

THIS was an action by the indorsee of a promissory note, against the Defendant as the maker of it.

The pleas on the record were, 1st, The general issue; and 2dly, Usury.

The

The uſury attempted to be proved on the [page 41
part of the Defendant was, that the Defendant had, in diſcounting the note in queſtion, given in part a diamond ring, for which he had charged much beyond its value.

It was ſaid by *Erſkine*, and aſſented to by Lord KENYON, that his Lordſhip and Mr. Juſtice *Buller* had ruled on former occaſions. That if in diſcount of a bill, the party diſcounting it gives goods in part; that if theſe goods are of a certain aſcertained value, and given at that value, that that is not uſury; but if the party ſo diſcounting the bill makes the holder of it take them at an higher value that that ſhall be deemed uſury; for that a party by ſubſtituting goods for money, ſhall not by colour of their pretended value take above legal intereſt, and evade the ſtatute.

Erſkine and——for the Plaintiff.

Mingay for the Defendant.

SECOND SITTING IN TERM, AT GUILDHALL.

Tuesday, Nov. 19th.

SLACK *v.* BRANDER and TIBBS, Sheriffs of *London*, and COULSON.

In treſpaſs and falſe imprisonment against a Sheriffs officer for anillegal arreſt it is evidence against him that the warrant was directed to him.

IN treſpaſs and falſe impriſonment. The action was brought, for arreſting the Plaintiff in the city of *London*, on a bill of *Middleſex* by *Coulſon*, one of the Defendants, who was a Sheriff's Officer. The Plaintiff proved the arreſt, and that the place where it was made was in the city of *London*.

For the Defendant the warrant under which the arreſt had been made was produced, and appeared to be directed to *Joſeph Coulſon* and *John Kellett*, and the execution indorſed was by *John Kellett* only; but the witneſs who proved the arreſt of the plaintiff ſaid, that the Bailiff who made the arreſt, ſaid his name was *Coulſon*.

Gibbs for the Defendant objected, That the indorſement on the warrant was to be taken as concluſive evidence that the arreſt was made by *Kellett*, and not by *Coulſon*, particularly as no evidence was offered that *Coulſon*

Coulſon was preſent. And that as the Plaintiff had made *Coulſon* only, a Defendent, that the Plaintiff ſhould be nonſuited. [page43

Lord KENYON over-ruled the objection, and held, that the warrant being directed to *Coulſon*, and having been executed by a perſon who called himſelf by his name, that it was ſufficient evidence to go to the jury, to decide whether *Coulſon* was preſent at the time of the arreſt or not.

Erſkine and——for the Plaintiff.

Gibbs for the Defendant.

SITTINGS AFTER TERM, AT WESTMINSTER.

SINTZENICK *v.* LUCAS.

Friday, Nov. 29th.

To an action on the caſe for unſkilfully doing any work, it is no defence that the Defendant in the action recovered in a former action for work and labour, which work and labour was that, for the unſkilfulneſs of which the action is thus brought.

THIS was an action on the caſe for unſkilfully varniſhing certain prints, the property of the Plaintiff, by which they were ſpoiled, and the Plaintiff loſt the ſale of them.

After the caſe had been ſtated on the part of the Plaintiff. [p.44

Garrow for the Defendant, took a preliminary objection, which if ſufficient, went to

twenty-ſix hours after the receipt of ſuch diſcharge; which was the falſe impriſonment complained of.

The reaſon aſſigned by the Defendant for detaining him was, that it was neceſſary to ſearch the office to ſee if any other writs were there againſt him, before they could diſcharge him with ſafety: That on ſearching the office a writ was, in point of fact, found there againſt a perſon of the ſame name with the plaintiff, but who on inquiry being found to be a different perſon, the plaintiff was immediately ſet at liberty.

Per Lord KENYON. When a perſon is arreſted, the officer is not bound to go immediately and ſearch the office, to ſee if there are other writs againſt him; nor is the officer called upon to do it till a written diſcharge comes from the plaintiff at whoſe ſuit he is in cuſtody for not before is he entitled to his diſcharge, and therefore not till then is the officer called upon to make the ſearch, which is for his own ſecurity. When therefore it becomes neceſſary for the officer to make ſuch ſearch, a reaſonable time muſt be allowed him for the purpoſe, and twenty-four hours does not ſeem to be an unreaſonable time for that purpoſe, particularly under the circumſtances of this caſe, when a writ was found apparently againſt the ſame Defendant.

His Lordſhip directed a nonſuit.

Erſkine and *Bayley* for the Plaintiff.

Mingay for the Defendant.

[page 4]

Tuesday, Dec. 3

SLIPPER, Assignee of LANE, a Bankrupt, *v.* STIDSTONE.

A debt due to two partners may be set off in an action brought against the survivor.

THIS was an action of *assumpsit* for goods sold and delivered. Plea of the general issue, with notice of set off.

The set off was, a debt due by the bankrupt to the Defendant, and one *Abbott*, who had been in partnership with him; but *Abbott* the partner was dead before the bringing of the present action.

Law for the Plaintiff contended, that to an action brought against the Defendant for a debt, and in his own right, that a debt owing to such person and another in a partnership account, could not be set off, inasmuch as debts due in the same right could only be set off; and cited *Bull. N. P.* 179.

To this it was answered by the Defendant's counsel, that the partner being dead, by law the right of action went to the survivor, who might maintain an action for it in his own name. That a set off being given to avoid a circuity of action, that the set off of the debt in question was to the same effect as if an action was brought in the Defendant's name only, and therefore should be allowed in an action against him in his own person.

Lord KENYON was clearly of this opinion and allowed the set off.

Law

page 48] *Law* and *Marryat* for the Plaintiff.

Erſkine for the Defendant.

In the following term, *Law* obtained a rule to ſhew cauſe why there ſhould not be a new trial, on the ſuppoſed miſdirection of the Judge, but he afterwards abandoned the rule, it being underſtood that the Court of *King's Bench* concurred in opinion with the Chief Juſtice; and he, on being aſked, admitting the point not to be maintainable.

Friday Dec 6th

ASHLEY *v.* HARRISON.

Caſe will not lie for libelling a performer on the ſtage, who is thereby prevented from acting, whereby the Plaintiff loſt the profits of her performance.

THIS was a ſpecial action on the caſe againſt the Defendant.

The declaration ſtated, That the plaintiff being director of certain muſical performances Oratorios, had among other performers engaged, at a conſiderable expence, one of the name of *Gertrude Mara*: That the Defendant, intending to injure the plaintiff, and to deprive him of the profits of ſuch performance, publiſhed a certain falſe and ſcandalous libel, of and concerning the ſaid Madam *Mara*, in conſequence of which ſhe was prevented from ſinging, from an apprehenſion of being hiſſed and ill-treated from the impreſſion the public mind received from ſuch libel

libel, whereby the plaintiff loſt the profits ariſing from the ſaid Oratorios, to his great injury, &c. The libel charged in the declaration was in the form of queries addreſſed in the newſpaper to Madam *Mara*, charging her with inſolence and contempt of the audience, and want of reſpect to the perſon of his Majeſty at public repreſentations where ſhe performed. [page 49

On opening this caſe on the part of the plaintiff, Lord KENYON threw it out as his opinion that the action was not maintainable he ſaid, that the injury complained of was too remote, and impoſſible to be connected with the cauſe aſſigned for it, ſo as to affect the Defendant in this form of action: That if the publication was an injury to Madam *Mara*, that ſhe might have an action for it; but as her refuſing to perform might have proceeded from groundleſs apprehenſion of what never might have happened, that the plaintiff ſhould not be at liberty to ſuggeſt the libel as the cauſe of that injury which might have proceeded from another cauſe, or perhaps from caprice or inſolence. But the counſel for the Plaintiff ſuggeſting that this might be taken advantage of in arreſt of judgment, his Lordſhip ſuffered the cauſe to proceed.

To prove the loſs of profits ſuſtained by the plaintiff from the abſence of Madam *Mara* from the performance, a witneſs of the name of *Brandon*, who was the box-keeper, was nal-

To prove the loſs of profits of the theatre from the giving up of boxes; the box-keeper is not an evidence to prove that they were ſo given up for any particular cauſe.

-ked. He was aſked, "if in conſequence of Madam *Mara*'s declining to ſing, ſeveral perſons had not given up their boxes?" The counſel for the defendant objected to this queſtion, and his Lordſhip ruled, that the witneſs might be aſked generally, "whether the
page 50] receipts of the houſe had not diminiſhed from the time Madam *Mara* had declined to ſing:" it being ſtated in the declaration, that in conſequence of the libel and Madam *Mara*'s refuſal to perform, the plaintiff had loſt the profits of the ſeveral performances: but that to aſk if particular perſons had not in conſequence given up their boxes, was ſpecial damage, and ſhould have been ſpecially laid in the declaration. That beſides, was it admiſſible evidence under the general averment; that *Brandon* was not the proper witneſs to prove it, but the parties themſelves who had given up their boxes, as they only could aſſign the motives which induced them to do ſo.

His Lordſhip afterwards recurred to his firſt opinion, that the action was not maintainable, and nonſuited the plaintiff.

Erſkine and *Shepherd* for the Plaintiff.

Mingay and *Bower* for the Defendant.

Same day

COWAN *v.* ABRAHAMS and Another.

In Trover for a bill of exchange, the Defendant muſt have notice to produce it, or the plaintiff cannot go into evidence of its being in the defendant's poſſeſſion.

THIS was an action of Trover for a bill of exchange, which had been picked out of the pocket of the plaintiff's clerk, and traced to the poſſeſſion of the defendants.

The

The declaration ſtated the bill of exchange [page 51
deſcribing it as drawn by *John Harriſon*, on *Robert* and *Thomas Harriſon*, in favour of *Thomas Bently* and by him indorſed to the plaintiff, in the uſual form.

The plaintiff proved by his clerk the poſſeſſion and loſs of the bill as deſcribed in the declaration.

Mingay for the Defendants objected to the going into any evidence reſpecting the bill as ſet out in the declaration, unleſs notice had been given to produce it; it being an inſtrument in writing, and the evidence for the plaintiff going to prove the contents of a written inſtrument.

The counſel for the plaintiff inſiſted, that it was ſufficient for them to give evidence of any inſtrument which was his property, as deſcribed in the declaration, and which had tortiouſly come to the defendant's poſſeſſion; and that as any variance between the inſtrument ſo ſet out in the declaration and the true one would nonſuit him, and that evidence was in the power and poſſeſſion of the defendant, that it could not be incumbent on the plaintiff to call for the production of evidence which might nonſuit him, but that that ſhould lie on the defendant, who could derive ſo much advantage from it. That the plaintiff could only be called upon to prove the averment in his declaration, which he did by the evidence offered, which deſcribed the bill of exchange

Vid. Wilſon v. Chambers. Cro. Car. 264.

exchange in the defendant's poſſeſſion, as laid in the declaration.

Lord KENYON ſaid, that though the merits of this caſe ſeemed ſtrongly with the plaintiff that the objection was founded on a rule of
page 52] law not to be departed from, namely, that the beſt evidence the nature of the caſe admits of is always to be given; that wherever there is written evidence, parol evidence of its contents is not the beſt evidence, and is therefore inadmiſſible; but that if the party in poſſeſſion of the written evidence will not produce it when called on, that then inferior evidence is admitted, that is parol proof of its contents. That the plaintiff in this was attempting to give parol evidence of the contents of a bill of exchange, without having given any notice to the Defendant to produce the original, which he could not do.

The Plaintiff was nonſuited.

Garrow and *'Eſpinaſſe* for the Plaintiff.

Mingay for the Defendant.

In the next Term, the plaintiff moved for a new trial, and got a rule; but the Court of *King's Bench* concurred in opinion with Lord KENYON, and therefore diſcharged it.

[page 58

DOE *ex dem.* WOODMASS *v.* MASON.

Same day

IN ejectment the plaintiff held by leaſe under the city of *London*.

Per Lord KENYON. The common ſeal for the city proves itſelf.

SITTINGS AT GUILDHALL,

AFTER TERM.

THRESH *v.* RAKE.

Saturday, Nov. 30th.

THIS was an action on the caſe, brought to recover the penalty for the breach of a ſpecial agreement.

Where an agreement in writing is to be performed on a certain day, and the parties agree to enlarge the time, a declaration on the day ſtated in the agreement, though the evidence is of a different day, will ſupport the action.

The agreement ſtated in the declaration was, that the defendant had agreed to aſſign to the plaintiff certain premiſſes, with the fixtures, &c. to be taken at a fair appraiſement by brokers to be named on both ſides. The appraiſement was to be made on the 13th of *Auguſt* following. It then averred, among other things, that the appraiſement was made and performance generally on the part of the plaintiff. [p. 54

It

It appeared in evidence, that in point of fact, the appraiſement had not been made on the 13th, but on the 14th of *Auguſt*, but that was accounted for in this manner, That *Cope* who was the broker named on the part of the defendant, had not ſent the inventory to the plaintiff's broker until the 14th, on which day the plaintiff's broker, with the conſent of the defendants broker, who was acting as agent for him, made the appraiſement on the inventory ſo ſent, and that without the inventory it could not be made; ſo that the delay was cauſed by the defendant's own default and performance on the day waved by his agent.

Garrow for the Defendant inſiſted, that this evidence was inadmiſſible, as it was receiving parol evidence to vary written, and did not ſupport the declaration. That in the written agreement produced in evidence, it was ſtated that the appraiſement was to be made on the 13th of *Auguſt*, and the declaration averred performance on that day; whereas the evidence offered on the part of the plaintiff, went to prove that the parties agreed to make the appraiſement on the 14th, and it applied only to that day. At all events he contended, that if it was admiſſible evidence, that the parties had ſo agreed to enlarge the time when the appraiſement was to be made, that that ſhould have been ſtated, or made the object of a ſpecial count in the declaration; whereas, as the pleadings ſtood, there

was

was only one count on the agreement averring the appraisement to have taken place on the 13th, when the evidence proved it to have really taken place on the 14th, and therefore the evidence did not support the declaration. [page 55

But it was ruled by Lord KENYON, that the evidence was good and admissible; for that when the parties by consent enlarge the time within which an agreement is to be performed, that it is a continuance of the same contract, and on a declaration on the original contract, performance on the enlarged time is good evidence, and will support the declaration.

Erskine, and *Shepherd* for the Plaintiff.

Garrow for the Defendant.

Vid, *Littler* v. *Holland*, 3 Term Rep. 590 and *Warren* v. *Stagg*, *ibid. cit.*

SHELDRICK *v.* ABERY & alt. *Same day*

THIS was an action of trespass, for killing the plaintiff's horse. Trespass *vi et armis* lies for killing the plaintiff's horse, though the injury arose from negligence.

The evidence was, that the horse was in a stage coach, which was driving on the proper side of the road. That the defendants were

page 56]

were riding in a cart, and driving violently; and had forced the ſhaft of the cart into the breaſt of the horſe, by which he was killed.

The declaration was in treſpaſs *vi & armis*, "That the defendant with force and arms drove the ſhaft of a certain cart into the breaſt of a certain horſe of the plaintiff's, by which he died, &c. &c.

Garrow for the defendant objected, that the action ſhould have been *caſe*, not treſpaſs *vi & armis*, as the injury aroſe from the negligence of the defendant in not driving on his own ſide of the road, ſo that the injury to the plaintiff being the conſequence of the defendant's negligence, that *caſe* was the proper action for injuries of that nature.

Lord KENYON over-ruled the objection. He ſaid, that the action was brought againſt the perſons who had done the injury: That the injury, from whatever negligence it proceeded, was accompanied with violence and in its effect immediately injurious; and that treſpaſs *vi & armis* was therefore the proper action.

Erſkine and *'Eſpinaſſe* for the Plaintiff.
Garrow for the Defendant.

HARDING *v.* CRETHORN;

Tuesday Dec 10th.

ASSUMPSIT for use and occupation. The case in evidence was, that the defendant had held the premisses by lease under the plaintiff, which lease expired in *June* 1792. During the continuance of the lease the premisses had been let to an under-tenant, who had continued in possession after the lease expired: and the question was whether he had been accepted by the Plaintiff, the lessor, as his tenant, or whether the defendant still continued liable to the rent accrued after the term expired, and during the time the under-tenant had continued in possession.

When a lease is expired, the tenant continues liable to the rent, unless he delivers up complete possession of the premisses, or the landlord accepts another in his room.

Per Lord KENYON. When a lease is expired, the tenant's responsibility is not an end; for if the premisses are in possession of an under-tenant, the land-lord may refuse to accept the possession, and hold the original lessee liable, for the lessor is entitled to receive the absolute possession at the end of the term. But it may be proved, that the lessor had accepted the under-tenant as his tenant, as by his having accepted the key from the original lessee, while the under-tenant was in possession; by his acceptance of rent from him, or by some act tantamount to it.

What is evidence of the landlord's acceptance of another tenant.

To prove the plaintiff's acquiescence to accept the under-tenant as his tenant when the lease had expired, a paper was produced, which was a notice from the defendant to the under-tenant then in possession, informing

him that his (the defendant's) term in the premiſſes was expired, and ordering him to pay
page 58] his rent in future to the plaintiff as his landlord. This notice was witneſſed by the plaintiff himſelf.

The counſel for the defendant contended that the circumſtance of the plaintiff's having witneſſed this notice, was concluſive evidence of his acceptance of the under-tenant in lieu of the defendant.

The having ſubſcribed any paper writing as a witneſs is not ſufficient to charge the witneſs with notice unleſs it is proved that he knew the contents.

Lord KENYON ruled—That the merely ſubſcribing an inſtrument as a witneſs ſhould not bind the party, unleſs there was ſome evidence that he was acquainted with its contents at the time, as one might ſubſcribe his name merely as an inſtrumentary atteſtation without any knowledge of what he had ſo atteſted.

On this intimation of his Lordſhip's opinion the defendant proved, that the notice had been read over in the plaintiff's preſence and that he had then ſubſcribed it—his Lordſhip ruled that to be concluſive, and the defendant had a verdict.

Shepherd for the Plaintiff.

Garrow for the Defendant.

Thurſday Dec. 12.

PHILLIPS *q. t. v.* MENDEZ DA COSTA.

In a declaration on the lottery act if the plaintiff avers the taking of a certain ſum for the inſurance of a number proof that that ſum was given for the inſurance of ſeveral numbers is a fatal variance.

THIS was an action of debt *qui tam* brought to recover ſeveral penalties for inſurances

ces in the State Lottery contrary to the ſeveral lottery acts.

The firſt count in the declaration ſtated, [page 59
That the defendant in conſideration of the ſum of 43 *l.* 2 *s.* had inſured a certain number, *viz.* No. 48,790 in the State Lottery, againſt the ſtatute, &c. whereby he had forfeited, &c.

The evidence in ſupport of this count was that the witneſs had inſured ſeveral numbers with the defendant the joint premiums upon which, he (the defendant) had calculated at 43 *l.* 2 *s.* ſo that the premium for each number was only a proportionable part of this ſum of 43 *l*, 2 *s.* which ſum he the witneſs had paid.

Garrow for the defendant objected, that this evidence did not ſupport the count, that the count was for inſuring a certain number at 43 *l.* 2 *s.* whereas the evidence proved that that ſum was paid for the inſurance of ſeveral numbers, ſo that in fact but part of it was paid for the inſurance of the number mentioned.

Lord KENYON was of that opinion, and the count was abandoned by the plaintiff's counſel.

The ſecond count in the declaration ſtated no conſideration, but generally, That the defendant had inſured a certain number, *viz.* No. 48,799 in the State Lottery for the thirty-ſixth days drawing of that lottery, againſt the ſtatute; &c. whereby he &c.

The

page 60]

A count stating generaly that the defendant had insured a certain number in the State Lottery it is not a variance if the witness proves that a premium was paid at the time.

The witness called to support this count proved the insurance of the number as laid in the declaration but that he had paid a certain sum as a premium.

Garrow objected to this evidence as being a variance from the count, which stated "that no consideration had been paid," whereas this evidence proved that a consideration had really been paid.

The counsel for the plaintiff answered the objection by insisting, that the count did not state "that no consideration had been paid," which would have been a distinct averment; but that it made no mention of any consideration whatever having been given, it merely stating the fact of the insurance: that, the paying the consideration made no part of the offence, which was the insurance of numbers in the Lottery, against the provisions of the statute; that that offence having been proved the plaintiff had proved the only material averment which the count contained, and precisely as laid.

Lord KENYON said, that the evidence did not vary from the count; that a variance must be of something material: that here the declaration stated merely, that the defendant had made an insurance contrary to the Lottery Acts, that what the witness had added did not vary the averment; as the stating the premium was no part of the offence which

was

was making the insurance, which the witness had proved.

[Plaintiff.

Bearcroft, *Shepherd*, and *Barrow*, for the

Garrow for the Defendant.

NEAL *v.* ERVING.

Same day.

When one person subscribes a policy with the name of another, proof of his having done it in many instances, is sufficient to charge him whose name is so subscribed, without producing any power of attorney.

ASSUMPSIT on a policy of insurance underwritten by the defendant on a ship from *Lynn* to *Weymouth*.

To prove the subscribing of the defendant's name to the policy, the broker who had negotiated the policy was called. He proved that the defendant's name on the policy had been subscribed by one *Hutchins*. He was asked by what authority *Hutchins* had done it. He said, he did not know; but that *Hutchins* was in the constant habit of subscribing policies in the name of *Erving*, and had done several for him and for others, to his knowledge.

Erskine for the defendant objected to this evidence on the ground that *Hutchins* must have done it by power of attorney from the defendant, which might have been limited, or for a particular purpose, and therefore that it should have been shewn that *Hutchins* was properly authorised, by producing the power of attorney.

Lord

Lord KENYON over-ruled the objection. and held that the acts of *Hutchins* held him out to the world as properly authoriſed; and his having ſubſcribed ſeveral policies in the defendant's name, was ſufficient evidence of that authority in order to charge the defendant; that if *Hutchins* was only a particular agent for the defendant, that it lay on him to ſhew it not the plaintiff.

Mingay and *Shepherd* for the Plaintiff.

Erſkine and *Law* for the Defendant.

page 62]

Bridg. Dig. 13

REX *v.* MUNTON.

Offences committed out of *England* are not cognizable by the court of kings Bench, unleſs there is a ſpecial act of Parliament for the purpoſe of giving them juriſdiction.

THIS was an information filed by the Attorney General againſt the defendant who was the principal ſtore-keeper at *Antigua* in the *Weſt-Indies*, for ſeveral miſdemeanors.

The principal charge upon which the information was founded was, that he had purchaſed in *England* certain ſtores of *Whitehead* and Co. at a certain nominal price agreed upon between them, which price he charged to Goverment in his returns to the *Navy Office* and that by colluſion between him and *Whitehead* and Co. the latter had made to him a conſiderable allowance in ſuch nominal price which allowance he reſerved to his own uſe, by which Government were defrauded to a large amount.

Theſe facts were clearly proved by a witneſs on the part of the Crown. [Er-

Erſkine for the defendant then took an objection to the juriſdiction of the Court, and inſiſted that it had none over the offence as proved. He ſaid that the evidence had proved the criminal matters to have been wholly done and compleated in the *Weſt-Indies*, and that therefore without an expreſs ſtatute to authorize it, that the Court of *King's Bench* could not take cognizance of matters committed out of the realm. He inſtanced the *Eaſt India* Bill which had been paſſed expreſsly for the purpoſe of giving the Court of King's Bench juriſdiction of Eaſtern delinquency. [page63

Lord KENYON aſſented to the objection, reſpecting the juriſdiction of the Court where the criminal matter aroſe wholly abroad and agreed that in ſuch caſe, to warrant the interpoſition of the Court of King's Bench that an act of Parliament was expreſsly neceſſary that however in the preſent caſe it appeared that the ſeveral falſe charges made by the defendant by which he had defrauded Government, had been in the ſeveral returns made by him from *Antigua* to the Navy Office in *London*. His Lordſhip therefore ſaid, that there was thereby an offence committed in *London* where ſuch falſe returns were received, and where the fraud had been cempleat by their having been there allowed, upon which the juriſdiction of the Court attached and he therefore overruled the objection.

But if any part of the offence has been compleat in *England* the court of *K. B.* then has juriſdiction.

A queſtion then aroſe, Whether as the information ſhould have laid the offence within the

the proper county, the Navy Office was in the City of *London*, where the information had laid the *venue*, and where the trial was had.

Lord KENYON ſaid, that if the books of the Navy Office which concerned the tranſaction upon which the information was grounded, had even come into *London*, that he ſhould hold that ſufficient to give the Court juriſdiction.

page 64]

The *Solicitor General Bearcroft*, *Bower* and *Baldwin* for the proſecution.

Erſkine, *Garrow* and *Wood* for the Defendant.

The defendant was found guilty, and was brought up the following term to receive the judgment of the Court, but it being an offence of a very ſerious nature, he was remanded, and the ſentence of the Court has not yet been pronounced.

YARKER *v*, BOTHAM et al.

The commiſſioners of bankrupt may make a verbal order for the payment of his expences to a perſon whom they have ſummoned to attend them and it ſhall be recoverable in aſſumpſit.

THE declaration in this caſe ſtated, "That a commiſſion of bankrupt having iſſued againſt one *Thomas Cooper* and one *John Brown* both of *Lancaſter*, under which the defendants had been choſen aſſignees, that a ſummons ſigned by the major part of the commiſſioners named in the commiſſion was ſerved upon the plaintiff

plaintiff requiring him to attend the ſaid Commiſſioners. That the Plaintiff did attend in purſuance of ſuch ſummons, and was then and there examined: That the plaintiff was put to great expence in coming from *Lancaſter* for the purpoſe of ſo attending the Commiſſioners, and that they had ordered a certain ſum of money to be paid to him for ſuch expences, for which ſum the action was brought.

By ſtat. 1 *Jac.* 1. *c.* 15. § 10, power is [page 65 given to the Comiſſioners to ſummon perſons having, or ſuſpected to have or detain any part of the property of the bankrupt, and to examine them reſpecting it. And by § 11 of the ſame ſtatute, "Such witneſſes ſo ſent for ſhall have ſuch coſts and charges as the Commiſſioners in their diſcretion ſhall think fit to allow."

The evidence in this caſe proved the attendance of the Plaintiff, and that having made a demand of his expences before the Commiſſioners, they ſettled the ſum to be allowed for the purpoſe: that *Botham* the defendant was preſent, and took an account of the plaintiff's demand, and promiſed to pay it.

This was the only evidence offered to ſupport the action.

The counſel for the defendant inſiſted that it was not ſufficient to ſuſtain the action: that the claim was under a proceeding before Commiſſioners of Bankrupt: that their pro-

ceedings were in writing, and that therefore an entry in writing in the proceedings to the effect set up by the plaintiff ſhould be ſhewn in order to intitle him to recover, whereas this was only by parol.

They further contended, that the plaintiff being himſelf a creditor: was bound to attend the Commiſſioners on their ſummons, and therefore could not claim an allowance for what he was bound by law to do.

page 66] Lord KENYON over-ruled both objections. He ſaid, that the act of Parliament having given the Commiſſioners a power to allow any perſon his expences whom they had called upon to attend them, that the order in the preſent caſe was made in purſuance of that authority, and that it was not neceſſary that it ſhould be in writing.

The Plaintiff had a verdict.

Law and *Barrow* for the Plaintiff.

Erſkine for the Defendant.

Saturday, Dec. 14th.

JOURDAINE Aſſignee of NOWLAN a Bankrupt, *v.* LEFEVRE, and Others.

Bankers have a lien upon bills or notes paid into their houſes for the balance of a general account.

TROVER for a promiſſory note brought by the plaintiffs as aſſignees of the bankrupt againſt the defendants who were bankers to the bankrupt. The defendants had been bankers to *Nowlan* the bankrupt. The note in queſtion had been paid into the defendant's houſe by *Nowlan* the

the day before he committed the act of bankruptcy, and wrote ſhort in his caſh account with the houſe. At that time there was a balance in favour of the bankrupt to the amount of 2 *l.* 15 *s.* [page 67

The bankrupt beſides his keeping caſh with the defendants had alſo a diſcounting account with them, and about a month previous to his bankruptcy they had diſcounted for him fifteen bills, five of which had turned out to be bad ones. The defendants inſiſted on their right to hold the note in queſtion, to indemnify them againſt the loſs they ſhould ſuſtain from the bad bills they had ſo diſcounted.

Lord KENYON was of opinion that a banker in a tranſaction ſuch as the preſent had a lien on a note ſo paid in, and of courſe a right to retain it for his balance, or as a ſecurity for a general account between him and the party who had paid it in: and though in the preſent caſe the diſcounting and caſh accounts were diſtinct and ſeparate, that there being a balance due to the defendants, that they might retain generally in order to cover it.

The bankrupt's wife was called to prove that the note had been paid into the defendants in contemplation of a bankruptcy. Her competency was objected to on the ground that ſhe came to increaſe the dividend by her teſtimoney, and of courſe the allowance to the bankrupt.

If the wife of a bankrupt may be a witneſs to prove a payment to have been made in contemplation of a bankruptcy

Lord

Lord KENYON thought that she was indifferent, inasmuch as if the plaintiffs recovered in this action, the defendants would be cre-
page 68] ditors against the bankrupt's estate to the amount of the note, on account of the deficiency of the discounted bills.

Erskine and *Park* for the Plaintiff.
Bearcroft and——for the Defendants.

Thursday Dec. 19.

WHITWELL and Others Assignees of STEVENS and HATTERSLEY Bankrupts *v.* THOMPSON.

A conveyance by deed to a child though declared to be void under Stat. 1 Jac. 1. if made when a trader is insolvent, is fraudulent and an act of bankruptcy.

THIS was an action of trover brought by the Plaintiff to recover two leases which had belonged to the bankrupts, and were then in the Defendant's possession.

The transaction under which the defendant had obtained possession of them was as follows: The defendant had been in the habit of lending the bankrupts his acceptances for their accommodation, but in the month of *June* 1789 suspecting their solvency and the state of their affairs, and insisting upon some security, the two leases in question were lodged in his hands for that purpose on the 10th of *June* of that year and at the same time a memorandum was made and signed by *Hattersley* one of the bankrupt in the name of the partnership, stating "that *Thompson* the defendant having for their

ac-

accommodation accepted two bills, one of [page 69
550 *l.* and the other of 746 *l.* that they had lodged in his hands as a collateral security the two leases in question, and in case he was obliged to pay those bills that he should be at liberty to dispose of them for his reimbursement."

The defendant having been obliged to provide for these bills, insisted that he had a right to hold the leases in question for his indemnity. The plaintiffs contended that the leases were so deposited by the bankrupts after an act of bankruptcy committed, and with a view of preference, to the prejudice of the creditors at large.

To establish an act of bankruptcy prior to this transaction, the plaintiffs gave in evidence first, a voluntary surrender or assignment of their shop effects and trade in *Whitechapel* to *John* and *William Stevens*, sons of one of the bankrupt, one of whom was just 21, and the other a minor and in *America*.

This surrender was by a memorandum in writing, written by *Hatterſley* and subscribed by him in the name of the partnership, purporting to be "an agreement in them to sell to *J.* and *W. Stevens* all their stock in trade, fixtures &c. at a fair appraisement, and adjoining house in consideration of 51 guineas," but this agreement was not signed by *John* and *William Stevens*. It was dated the 29th of *May* 1789,

This

page 70] This agreement though fraudulent as againſt creditors, was admitted not to be an act of bankruptcy, it not being by deed.

The counſel for the plaintiffs then gave in evidence a deed dated 30th of *May* 1789, by which *Stevens*, one of the bankrupts, gave ta *Hatterſley* and his wife (who was daughter to *Stevens*) certain freehold premiſſes then in mortgage to him for 700 l. and alſo certain copyhold premiſſes, to which he had been admitted, to them for ever, but as to the eſtate of *Hatterſley*, in truſt for the ſole and ſeparate uſe of his wife, with a covenant that he (*Stevens*) would at any time ſurrender to the above mentioned uſes.

This conveyance being by deed, and not in made purſuance of any agreement before marriage, and at a time when the partners were proved to be inſolvent; was contended to be a clear act of bankruptcy, and being prior to the 10th of *June* when the leaſes in queſtion were depoſited, that it over-reached that tranſaction.

Bower for the defendant contended, that it was not an act of bankruptcy: that the ſtatute 1 *Jac.* 1. 15. § 5 having declared all conveyances by the bankrupt to his children to be void, that it would be nugatory to declare the making of ſuch conveyances to be alſo an act of bankruptcy, which would of itſelf avoid all conveyances ſo made. That the ſtatute had enumerated expreſsly ſeveral things

things which are acts of bankruptcy, but in the case of an assignment to a child, such as the present, only declared it to be void.

Lord KENYON was of opinion that the [page 71
clause of the statute mentioned was perfectly reconcileable with those which are declaratory of what are acts of bankruptcy. That the stat. 1 *Jac.* 1. *c.* 15, having declared the making of any fraudulent grant or conveyances an act of bankruptcy, had not said, that the making a voluntary and void one should not be an act of bankruptcy: that the distinction was, that if the conveyance to a child was voluntary and inconsistent with the provisions of the statute, but not fraudulent, that it was merely void; but that if it was fraudulent, that it was an act of bankruptcy.

His Lordship having declared his opinion respecting the operation of the deed: *Erskine* contended that the transactions proved amounted to acts of bankruptcy in both parties: in *Stevens*, by the agreement jointly with *Hattersley* to assign to his sons, and by the assignment by deed to his daughter; and in *Hattersley*, by his joining in the assignment, by taking that property to the sole and separate use of his wife, which if not so disposed of would have belonged to the creditors, whom by such deed he had defrauded.

Where one partner makes a fraudulent grant by deed to another partner, it is an act of bankruptcy in the former, but not in the latter.

Lord KENYON was of opinion that the agreement and assignment coupled together amounted to evidence of an act of bankruptcy in *Stevens*, the grantor by whom the deed had been made, but not in *Hattersley*. [An

An act of bankruptcy was then proved to have been committed by *Hatterſley* in the month of *Auguſt* of the ſame year.

[Page 72]

It then became a queſtion, How far the depoſit of the leaſes in queſtion ſhould be affected by the acts of bankruptcy ſo proved.

Where two partners join in aſſignment of any property as a ſecurity for a debt, one of whom has at the time committed an act of bankruptcy it is void as to a moiety only.

The counſel for the defendant abandoned all claim to the moiety claimed under *Stevens* the act of bankruptcy in him being eſtabliſhed on the 30th of *May*, which preceded the delivery of the deeds to the defendant, which was on the 10th of *June*; but they contended that they had a right to hold them as to *Hatterſley*'s moiety, his bankruptcy not having taken place, till the month of *Auguſt* following.

They then gave in evidence that the defendant had frequently aſſiſted the bankrupts with money previous to the 10th of *June*, and that then being preſſed by them for further aſſiſtance, that he had done it on condition of receiving ſecurity for his indemnity, and that the leaſes in queſtion were given to him for the expreſs purpoſe of indemnifying him and that at the time he ſo received them, that he was in fact under the two acceptances mentioned in the memorandum of agreement between them.

Lord KENYON in his charge to the Jury ſaid, that all the caſes without a ſingle exception, where the aſſignment of his property by a trader had been deemed fraudulent and

and an act of bankruptcy had been where it had been given for a by-gone and before-contracted debt, but that it never could be taken to be law, that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who would assist him in his difficulties, as a security for any advances such person might make to him. This was the case, provided such trader had not committed any act of bankruptcy at the [page 73
time he so disposed of his property, as by reason of it, all dominion which he had over his property was compleatly at an end. That in the present case the defendant had fairly taken the leases in question, and under the circumstances proved, was entitled to hold them, as against the assignees of that partner who had, at the time, not committed any act of bankruptcy, so that he therefore was entitled to a moiety of the leases in question: that as that gave him a title to hold the leases that the defendant must have a verdict, but subject to the claim of the assignees for the other moiety.

Erskine, *Mingay* and *Baldwin* for the Plaintiff.

Bower, *Garrow* and *Shepherd* for the Defendant.

THELLUSON *v.* FLETCHER.

Saturday, Dec 21th.

THIS was an action brought to recover the amount of the defendant's subscrip-

Where a ship sustains a partial loss, the insured cannot abandon nor is the answer of the underwriters desiring them "to do the best they can with the damaged property" evidence of their assent so as to make it a total loss.

tion to a policy of insurance on 42 hogsheads of sugar shipped on board a vessel from *Ostend* to *Havre*. The plaintiff went for a total loss.

The vessel sailed from *Ostend*, but was forced on shore, and the cargo damaged. The
page 74] Assured wrote to the Underwriters to inform them of the circumstances, and of the particulars of the injury the sugars had sustained. The letter was shewn to the underwriters by the broker; they in answer, desired "That the Assured would do the best they could with the damaged property."

Erskine for the plaintiffs the Assured, contended, that their letter to the Underwriters and the directions given by them in consequence of the letter, was an abandonment by the Assured, and an assent to it by the Underwriters, and that they therefore were intitled to recover for a total loss.

Lord KENYON said, that the loss appeared to be but a partial one, and that the Assured could not by their own act turn it into a total one. That it was the interest of the Underwriters to make a partial loss as light as possible, and that it was the duty of the Assured to do so, and that this was the meaning and import of the letter.

The Plaintiff was nonsuited.

Erskine, Bower and *Giles* for the Plaintiff.
Law for the Defendant.

WILKINSON *v.* COVERDALE.

Same day.

Case will lie where a party undertakes to get a policy done for another, without any consideration if the party so undertaking it takes any steps for that purpose, but does it so negligently that the person has no benefit from it.

THIS was a special action on the case against the defendant for negligence.

The declaration stated, That the defendant had undertaken to procure an insurance against fire for certain premisses belonging to the plaintiff, and on his account, which insurance he had effected, but that he had conducted himself so negligently in the perfecting such insurance, that the premisses having been burned by fire, that the plaintiff had not been able to recover any part thereof against the fire office, whereby he had suffered a total loss.

The case as stated on the part of the plaintiff was, that he had purchased the premisses in question from the defendant in the month of *August* 1792: the defendant at that time had a subsisting policy from the *Phœnix* Fire Office from *December* 1791, to *December* 1792 that the defendant had undertaken to get this policy renewed on account of the plaintiff, and in fact had renewed it and charged a sum of 16 *l.* as the premium paid, but that it being necessary where a party who has an insurance standing in the office, assigns or mortgages his interest in the premisses insured, that an indorsement should be made on the policy testifying such matter, and allowed at the office by some of the acting members of the Company; that the defendant had neglected to have this assignment and allowance made

made at the office, in conſequence of which
page 76] the plaintiff was precluded from having any remedy on the policy againſt the office and had ſuſtained a total loſs.

It was admitted on the part of the plaintiff, that there was no conſideration whatever moving from him to the defendant for this undertaking to get the policy on his account, but that the defendant had undertaken it gratuitouſly on the plaintiff's account.

On this circumſtance being admitted Lord *Kenyon* expreſſed a doubt, whether any action could be maintained on ſuch an undertaking.

Erſkine for the plaintiff cited a manuſcript note of a caſe decided at *Niſi Prius* before Mr. Juſtice *Buller* of *Wallace* v. *Tellfair*, wherein the Judge had ruled in an action ſimilar in point of circumſtances with the preſent, That though there was no conſideration for one party's undertaking to procure an inſurance for another, yet where a party voluntarily undertook to do it, and proceeded to cary his undertaking into effect by getting a policy underwritten, but did it ſo negligently or unſkilfully, that the party could derive no benefit from it, that in that caſe he ſhould be liable to an action: he then contended, that the defendant in the preſent caſe had brought himſelf within the rule ſo laid down by the learned Judge, he having effected the policy, but by his negligence in not procuring the allowance at the Fire Office on the aſſignment

assignment of the premisses, that the plaintiff had lost all benefit from it.

Lord KENYON acquiesced in the distinction and suffered the cause to proceed. [page77

The plaintiff failed in proving any promise of the defendant to procure the insurance as stated in his case, and was nonsuited.

Erskine and *Gibbs* for the Plaintiff.

Law Chambre and *Park* for the Defendant.

THELLUSSON *v.* BEWICK.

In a policy of insurance the under-writer does not insure against any loss that may arise from the difference of exchange

ASSUMPSIT to recover the amount of the defendant's subscription to a policy of insurance on ninety-four casks of sugar.

The sugars had been shipped on board the ship *Ami*, from *Havre* to *Ostend*. She sailed from *Havre*, but had not proceeded far on her voyage when the loss took place. The plaintiffs went as for a total loss, with the benefit of salvage to the under-writers.

The question in the case was, whether the insurers were liable on the difference of exchange.

The policy had been under-written in *September* 1791; the exchange was then at 24 *d.* on the *French* crown of three livres; soon after which the loss happened. Part of the cargo was saved, and sold at three months credit, and of course was to be paid for in *January* 1792. [page78

[Before

Before the ſeveral payments were made by the under-writers, the exchange on the *French* crown of three livres had fallen ſucceſſively from 24, as it ſtood at the time of making the policy, to 15 and 7 3-4ths, at which rate the under-writers were ready to pay.

For the plaintiff it was contended, that the payment ſhould be at the rate of 24 *d.* on the *French* crown of three livres. That a policy of inſurance was a contract of indemnity, and that unleſs the payment was at that rate, that he would not ſtand indemnified under the policy.

Lord KENYON ſaid, that nothing was clearer than that the inſurers did not inſure againſt the debaſement of the coin. That the queſtion therefore of the riſe or fall of exchange was intirely in this reſpect out of the province of the jury to decide on, in the preſent queſtion. That in the caſe the exchange had riſen, that the inſured would have had the benefit of the riſe, and therefore in caſe of a fall, ſhould ſubmit to the loſs.

Erſkine and *Baldwin* for the Plaintiff.

Law for the Defendant.

END OF MICHAELMAS TERM,

34 GEORGE III.

CASES

ARGUED AND RULED

AT NISI PRIUS

IN THE

KING's BENCH;

HILARY TERM,

34 GEORGE III.

FIRST SITTING IN TERM,

AT WESTMINSTER.

KIRK *v.* FRENCH.

Tuesday, Jan. 28.

In an action of malicious profecution a Judge's order to ſtay proceedings in the firſt ſuit is on payment of coſts, and proof of ſuch payment, is not ſufficient evidence, that the firſt ſuit is at an end.

THIS was an action of malicious profecution againſt the defendant, for maliciouſly arreſting and holding the plaintiff to bail for 800 *l.* in an action of trover when the defendant had no cauſe of action.

The

page80] The declaration contained the usual averment, "that the former action was determined, and at an end."

To prove this, the counsel for the plaintiff produced a Judge's order to the following effect :—

French v. *Kirk.* "It is ordered by the consent of both "parties, that upon payment of costs "to be taxed by the Master, all further proceedings in this cause shall "be stayed, &c. &c.

And they then were proceeding to prove by a witness the payment of these costs as taxed by the Master in that action, contending, that as the proceedings were under the Judges order to be stayed on payment of the costs that proof of the payment of the costs was a proof of the stay of proceedings, and that the suit was at an end.

Mingay for the defendant insisted, that this proof was insufficient; that it was substituting deduction for positive fact. That the suit should be shewn to be at an end by producing a judgment of *non pros*, or some positive evidence of that sort.

Erskine said, that there were no proceedings on the record, and therefore they could produce no judgment of *non pros*. That the Judge's order was at first conditional, to stay the proceedings on payment of costs, but that

when

when the coſts were paid, it then became abſolute, and the ſuit compleatly at an end. [page81

Lord KENYON ſaid, That the inclination of his mind was, that the evidence was inſufficient, as the evidence offered did not ſeem to be the beſt the nature of the caſe admitted of. But from ſome circumſtances which appeared in the caſe, he recommended it to both parties to withdraw a juror.—To which intimation they agreed.

Erſkine *Garrow* and *Morgan* for the Plaintiff.

Mingay for the Defendant.

SECOND SITTING IN THE KING'S BENCH,

IN TERM,

AT WESTMINSTER.

BOWMAN *v.* NICOLL. *Monday, Feb. 3*

ASSUMPSIT by the indorſee to recover the amount of a bill of exchange againſt the acceptor.

Every alteration in an inſtrument requiring a ſtamp, makes it a new inſtrument, and requires a new ſtamp.

page82] The bill was drawn the 2d of *September* 1793 payable twenty-one days after date, While the bill remained in the hands of the drawer it was altered with the conſent of the acceptor, and made payable fifty-one days after date: on the 30th of *September*, when it was over-due according to its original tenor and date, it was again re-altered to twenty-one days, and the date changed from the 2d to the 14th of *September*: after this it was negotiated, and the action brought on it: but in the ſeveral alterations the old ſtamp remained, nor was there any new ſtamp affixed.

Lord KENYON was of opinion, on theſe facts appearing, that the plaintiff muſt be nonſuited; as every alteration in any inſtrument requiring a ſtamp, made it a new inſtrument, and a new ſtamp neceſſary. He therefore nonſuited the plaintiff.

Erſkine and——for the Plaintiff
Mingay and *Ruſſell* for the Defendant.

The next Term the plaintiff moved for a new trial, but the Court concurred in opinion with the Chief Juſtice.—*Vid. Stonelake* v. *Babb* 5 *Burr.* 2673. and S. C. 5 Term Rep. 537.

LAST SITTING IN TERM, AT GUILDHALL. [page83

SOLOMONS *v.* DAWES.

Tuesday, Feb. 11.

Where in an action of trover the demand of the goods is not made by the party himself a refusal on the ground that the party applying is unknown, or not properly authorised, is not sufficient to support the action.

TROVER for a box and jewels.—The demand had been made by the plaintiff's wife. The defendant had detained them till paid a demand he set up against the plaintiff for lodging.

Per Lord KENYON. In an action of trover where the demand of the things for which the action is brought, is not made by the plaintiff himself, who is the owner, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know to whom the things belong, and therefore keeps them till that is ascertained: or that the person who applies is not properly impowered to receive them: or until he is satisfied by what authority he applies, that shall not be deemed such a refusal as shall be evidence of a conversion sufficient to support this action.

Mingay and *Marryat* for the Plaintiff.

Garrow for the Defendant.

Same day

KNIBBS *v.* HALL.

Where a party threatened with a diſtreſs for rent pays money againſt the payment of which he might legally have defended himſelf, but does not do it, this ſhall not be deemed a payment by compulſion, nor ſhall he be allowed to ſet it off againſt another demand.

THIS was an action of *aſſumpſit* for uſe and occupation of certain rooms in the City Chambers. Plea of the general iſſue, with notice of ſet-off.

One article of the ſet-off which the defendant propoſed to give in evidence aroſe in the following manner. The defendant being indebted to the plaintiff for the rent of other chambers belonging to the plaintiff, which he then occupied, the plaintiff demanded payment at the rent of 25 guineas per year. The defendant inſiſted that he had taken them at 20 guineas per year only, and offered to pay at that rate. The plaintiff refuſed to take it, and threatened to diſtrain if not paid at the rate of 25 guineas; and the defendant, in order to avoid the diſtreſs, paid at that rate and now brought a witneſs to prove that the chambers for which he had paid at the rate of 25 guineas, were really let at 20 guineas; ſo that he had overpaid the plaintiff, and now propoſed to ſet off the overplus, as having been paid by compulſion, and in his own wrong.

Lord KENYON was of opinion, that this could not be deemed a payment by compulſion, as the defendant might have by a replevin defended himſelf againſt the diſtreſs: that therefore after a voluntary payment ſo made, that he ſhould not be allowed to diſpute

pute its legality; and therefore rejected the evidence.

Garrow and——for the Plaintiff.

Erſkine for the Defendant.

SITTINGS AFTER TERM, IN THE KING's BENCH AT WESTMINSTER.

BUCKLAND *v.* TANKARD,

Saturday, February 15th.

A person whoſe name is on a bill as indorſer, cannot be a witneſs to prove a property in it in himſelf, and that it was indorſed to the plaintiff without conſideration.

ASSUMPSIT by the plaintiff, as indorſee of two bills of exchange, againſt the defendant as the acceptor.

The bills had been drawn by one *Gregſon*, in his own favour, and by him indorſed to the plaintiff. His hand-writing was proved, and that of the defendant, the acceptor; upon which the plaintiff reſted his caſe.

The defence upon which the defendant relied was, that the bills in queſtion were accommodation paper between *Gregſon* and him and that that circumſtance was known to the plaintiff, who beſide that, had given for them no value whatſoever.

Gregſon the indorſer was called as a witneſs, he having been releaſed. The evidence given by him was, that he having accepted

two

page86] two bills of exchange for *Tankard* the defendant, that *Tankard* had accepted the two bills in queſtion to the ſame amount for him as a counter ſecurity. He ſaid, that being unwilling to preſs *Tankard*, or to ſue him in his own name, that he applied to the plaintiff, informing him of the circumſtances, and requeſted that he would take the bills, and pretend to *Tankard* that they had been indorſed to him for a good conſideration, and to threaten to ſue him, if they were not paid: that the plaintiff conſented, and that he then indorſed them; ſo that the plaintiff took them under the circumſtances mentioned, and had never given to him any conſideration for them whatever, but had commenced the preſent action in breach of the agreement ſo made with the witneſs; and that the bills ſtill remained *bona fide* his property.

Lord KENYON then ſtopped the witneſs, and ſaid that the evidence was inadmiſſible, as he claimed a property in the bills himſelf.

Erſkine for the defendant contended, that as to the event of this ſuit he was indifferent, as it reſpected the defendant only; but that at all events the releaſe gave him complete competence.

His Lordſhip ſaid, that he had an intereſt in the preſent action upon which the releaſe could not operate; for that if the plaintiff ſucceeded in the preſent action, that the bills were *functi officio*, in which caſe they were loſt

loſt to him, as he could never derive any benefit under them; but that the effect of his teſtimony, if believed, went to defeat the plaintiff's action, by which means the bills would remain entire and undiſcharged, and belong to him: ſo that by impeaching the plaintiff's title to the bills, he ſet up his own and was therefore intereſted. His teſtimony was therefore rejected; and the plaintiff recovered. [page 87

Garrow and *Leyceſter* for the Plaintiff.

Erſkine for the Defendant.

In the next term a new trial was moved for in this cauſe, and the rule diſcharged.

MURRAY *v.* DURAND.

Some day.

In an action againſt the Sheriff for not aſſigning a bail-bond when the bail has been put in and juſtified after the action brought and the plaintiff has not moved to ſet it aſide it is a compleat bar to the action.

THIS was an action on the caſe againſt the defendant as Sheriff of the county of *Surry*.

The declaration contained two counts the firſt for an eſcape, the ſecond was for not aſſigning the bail-bond.

The evidence on the plaintiff's caſe was, That the plaintiff having ſued out a bailable writ againſt one *Bland*, returnable the firſt return in *Michaelmas* term (6th of *November*) that bail ſhould have been put in, by the prac-

practice of the court, in six days, that is, on the 12th: That the plaintiff on the 13th searched to see if any bail had been put in, and finding none, applied for an assignment of the bail-bond, when it appeared in fact that no
page 88] bail-bond had been taken; upon which he commenced the present action.

The counsel for the defendant said, that bail had been put in, and produced the rule for the allowance of bail in the cause; and insisted that that was a compleat answer to the present action.

It appeared however, that the bail had justified on the last day of *Michaelmas* term, and the plaintiff's counsel contended, that this being after the commencement of the plaintiff's action, when a right of action had attached in the plaintiff, that it could not be barred by it.

But *per* Lord KENYON. By the rule now produced it appears that the defendant has satisfied the exigence of the writ, bail above being put in, and having justified, that is now subsisting-bail, and must be taken *nunc pro tunc*. This therefore being an action in fact for not taking a bail-bond, is falsified by the rule now produced; and therefore I am of opinion that the action is barred. The plaintiff should have applied to have set aside the justification of the bail, as while it subsists, the action is not maintainable.

His

His Lordship therefore directed the plaintiff to be called, but with liberty to the plaintiff's counsel to move to set the nonsuit aside.

Erskine, *Russell* and *Lawes* for the Plaintiff.

Bower Garrow and *Manly* for the Defendant.

The plaintiff did not move for a new trial.

[page 89

JOHNSON *v.* MASON.

Monday, Feb. 17th.

THIS was an action of replevin. The defendant made conusance first under Lord *Stamford*, and secondly under one *Ballard*, for rent arrear.

The premises for the rent, of which the distress had been made, had been limited to a Mrs. *Doberty* for life, remainder over. This remainder over had vested by purchase in Lord *Stamford*. Mrs. *Doberty* the tenant for life, was dead, so that at the time of the distress taken, Lord *Stamford* was seised in fee in possession.

Mrs. *Doberty* in her life-time having no power to make leases, had nevertheless demised the premises by lease to *Ballard*, for twenty-one years. She died before the lease expired, and *Ballard* paid his rent to Lord *Stamford*, and continued in possession though his lease was void, and soon after, in consideration of 500 *l.* paid to him by the plaintiff let to him the premises for the unexpired remainder of the twenty-one years.

A party who has executed a deed ſhall not be permitted to acknowledge it; it muſt be proved by the ſubſcribing witneſs.

Mrs. *Ballard*, wife to *Ballard* the leſſee, was called as a witneſs.

Erſkine for the plaintiff produced the deed by which her huſband had demiſed the premiſes to the plaintiff, which ſhe had executed as aſſignee for her huſband, and aſked her if ſhe had ſo executed it.

page 90] *Garrow* for the defendant objected to the queſtion, until the deed was proved by the ſubſcribing witneſs.

Lord KENYON ſaid, that Lord MANSFIELD had once by ſurpriſe allowed a man to acknowledge his own deed in court, without calling the ſubſcribing witneſs, but that he afterwards changed his opinion, and held that a party ſhould not be allowed to acknowledge his deed, until it had been proved by the ſubſcribing witneſs.

The deed was then proved in that manner.

When a party executes a deed under a power of attorney, the power of attorney ought to be produced.

Erſkine was then proceeding to aſk her ſome queſtions ariſing out of the deed. This was objected to unleſs her power of attorney was produced, ſhe having executed the deed by virtue of ſuch power.

Lord KENYON ruled it to be neceſſary that the power of attorney ſhould be produced.

The circumſtances of the caſe then given in evidence were, that, at the time when the leaſe was made to the plaintiff, that he was informed by the witneſs, that the premiſes were

were held under Lord *Stamford*; and at the ſame time that all the receipts which *Ballard* had taken for rent paid at different times to Lord *Stamford*, were delivered to him.

The plaintiff's counſel contended that the defendant ſhould ſhew ſome title in Lord *Stamford*, as in caſe the action had been ejectment, without ſuch evidence the plaintiff could not recover.

Lord KENYON ſaid, that in this caſe it appeared, that the plaintiff, at the time of taking the leaſe, had notice that the premiſes belonged to Lord *Stamford*: That however it might be in ejectment, that in this caſe there was no defence, and he doubted if there would be any in ejectment: That in replevin, receipt of rent was title: That *Ballard* confeſſedly held under Lord *Stamford*, and he had informed the plaintiff of that circumſtance, who took the premiſes ſubject to that rent, and therefore if deſtrained on by the perſon ſubject to whoſe claim of rent he took the premiſes, that he could not in this action conteſt it. [page 91

Where a tenant has, on coming into poſſeſſion, under an aſſignment had notice that the leaſe was held under any particular perſon to whom the former tenant has paid rent, the title of this perſon cannot be conteſted in an action of replevin.

The Defendant therefore had a verdict.

Erſkine and *Wigley* for the Plaintiff.

Garrow for the Defendant.

BERNARD *v.* REED.

Same day.

ASSUMPSIT by the Plaintiffs, who were foreign merchants living at *Liſle*, to recover the value of a quantity of lace; ſold by them to the defendant.

If a foreign merchant ſells abroad contraband goods knowing they are to be ſmuggled into this country, and aſſiſts in the ſmuggling, he cannot recover the value of them

The

The defence was, that the goods were contraband, purchaſed from the plaintiff for the purpoſe of being ſmuggled into *England*; which circumſtance was well known
page92] to the plaintiffs, who for that purpoſe packed up the lace in a particular manner, for the purpoſe of more convenient carriage, and which it was proved was different from their uſual mode of packing it when it was not to be ſmuggled.

It was admitted that the plaintiffs were foreigners. The counſel for the plaintiff cited the caſe of *Holmann* v. *Johnſon*, *Cowp.* 341. and relied that the contract having been made abroad, and the delivery there compleat, that the caſe was ſtrictly in point; and that it had been laid down by Lord *Mansfield* that foreigners were not bound by the revenue laws of this country.

Lord KENYON ſaid, he had conſiderable doubts on the caſe, and whether, in caſe it appeared that the plaintiff, though a foreigner, knew that the goods were to be ſmuggled, that he ſhould be allowed to recover; and therefore wiſhed the jury to find whether the plaintiff knew of the circumſtance or not.

Mingay cited a caſe ſaid to have been ruled by Mr. Juſtice *Buller* that in an action for wheat ſold at *Dunkirk* by a foreigner, that the foreigner having aſſiſted in ſmuggling it into *England*, that he could not recover.

The

The jury found a general verdict for the plaintiff; but the next cauſe turning on the ſame point, they found the matter ſpecially. In the next term that cauſe came on to be argued, and the court held that the plaintiff could not recover.

Erſkine and *W. Beſt* for the Plaintiff.
Bower for the Defendant.

[page 93

WILLIAMS *v.* SHAW.

Mordaunt 338. 37.

If a mortgagee uſes timber on the mortgaged premiſes, which has been furniſhed to the mortgagor but not paid for, he ſhall be liable, though he is afterwards evicted.

TROVER for a quantity of timber.—one *Powell* was leſſee of certain ground upon which he had began to build ſeveral houſes, and the timber had been furniſhed by the plaintiff.

Powell, before the houſes were finiſhed, and before the timber had been uſed, mortgaged the premiſes to the Defendant, and ſoon after became a bankrupt.

The Defendant entered on the premiſes, and continued the buildings, and worked up part of this timber which he had found on the premiſes into the houſes.

The Plaintiff brought trover for it, and the defence ſet up by the Defendant was, that the aſſignees of *Powell* having diſcovered an act of bankruptcy previous to the mortgage, he had been forced to give up his mortgage

mortgage deed; and that the aſſignees were now in poſſeſſion of the premiſes.

Lord KENYON ſaid, that however hard the caſe might be, that if *Shaw* the Defendant had given any orders for uſing the timber while he was in poſſeſſion under the mortgage, and before the aſſignees had evicted him, for ſo much he was liable, as had been uſed, by his order and direction.

The Plaintiff proved part ſo worked up
page 94] by his orders, and had a verdict.

Erſkine and *Park* for the Plaintiff.

Mingay for the Defendant.

DOE *ex dem.* PARRY *v.* HAZELL.

Tueſday, Feb. 18.

EJECTMENT for an houſe.—The Defendant had taken the houſe by the month, and a month's notice to quit had been given.

It was agreed, that the notice had reference in all caſes to the letting, and that a month's notice was ſufficient to entitle the Plaintiff to recover.

Marryat for the Plaintiff.

Lawes for the Defendant.

LAST SITTING IN TERM, AT WESTMINSTER.

The KING *v.* BLACKMAN.

Wednesday, Feb. 19.

A peace officer who in searching for other goods discovers naval stores, & an information is filed in pursuance of such discovery from him, is to be deemed the informer.

THIS was an information against the Defendant under stat. 17 *Geo.* 2. *c.* 40. *s.* 10. for having naval stores in his possession, contrary to stat. 9 & 10 *Wm.* 3. *c.* 41.

The first witness called for the Crown, was a Police Officer. He stated that an information having been given at the office to which he belonged, that the Defendant had in his possession a quantity of iron, copper and brass; that he went with a warrant to search for it, and that in making his search, he had discovered the naval stores in question. He was asked on his *voire dire* by *Erskine* for the Defendant, if any officer or other person had given information to the Admiralty respecting these stores. He answered in the negative, upon which *Erskine* objected to his competence.

He stated, that the statute 17 *Geo.* 2. having given a moiety of the penalty of 200*l.* which that statute inflicts on persons having naval stores in their possession, to the informer, that as no previous information had been

page 96] been given to the Admiralty, that the witneſs muſt be deemed to be the informer, and therefore intereſted.

Though ſtat. 27, Geo. 2. c. 40. leaves an option in the Judge either to inflict corporal puniſhment or impoſe a fine, the expectation of a ſhare of the fine ſhall render a witneſs incompetent.

It was anſwered, that the ſame ſtatute alſo left it in the diſcretion of the Judge who tried the offender to inflict a corporal puniſhment in lieu of ſuch fine of 200 *l.* and which puniſhment the court had in a recent inſtance inflicted. That as therefore before ſentence it could not appear, whether the ſentence would be by fine, or by corporal puniſhment, and it might be by the latter, that that ſhould rebut the ſuppoſition of intereſt.

The witneſs was then aſked if he did not expect part of the fine, in caſe the Defendant ſhould be convicted; he ſaid, that he did. Being aſked if he would releaſe, he refuſed it.

Lord KENYON ſaid, that he was of opinion that the witneſs was incompetent. That though there certainly was an option in the Judge either to fine or to inflict corporal puniſhment, that the former mode had generally been adopted: and though in the caſe alluded to, the court had inflicted a corporal puniſhment, that had been in conſequence of declarations by the perſon convicted, that he did not mind the fine, as he could eaſily pay it. That therefore on the footing of intereſt he thought a witneſs in a caſe of this deſcription, inadmiſſible; but that the declarations of the witneſs in this caſe ſufficiently ſhewed the bias of his mind, that the proſpect

ſpect of a ſhare of the fine would influence his teſtimony. He therefore rejected him.

Mingay and *Brodrick* for the Crown.

Erſkine for the Defendant.

[page 97

POWELL and Another *v.* BLACKETT.

Thurſday, Feb. 20th.

DEBT on a bond.—Plea of *non eſt factum*.—To prove the execution, the ſubſcribing witneſs was called, who was the Defendant's ſhopman. Being aſked if he had ſeen the Defendant ſeal and deliver the bond in queſtion; he ſaid not: That the Defendant brought the bond to him ready ſigned and ſealed; told the witneſs that he had executed it, and deſired him to ſubſcribe his name, as a witneſs to the execution, which he accordingly did.

If the obligor of a bond acknowledges to the ſubſcribing witneſs that he executed it, it is ſufficient.

Lord KENYON ruled it to be ſufficient proof of the execution.

Erſkine and ——— for the Plaintiff.

Mingay for the Defendant.

The KING *v.* EDEN.

Friday, Feb. 21ſt.

THIS was an indictment for perjury.—The perjury aſſigned was, that in a certain action wherein one *Earle* was the Plaintiff, and *Brett* the Defendant, which

On an indictment for perjury in what the defendant as a witneſs ſwore on a trial, the party againſt whom the verdict went in conſequence of ſuch teſtimony is inadmiſſible, until he has paid the debt and coſts in that action.

was an action brought to recover the price of certain wines, ſuppoſed to have been ſold by *Earle* to *Brett*, it became material to decide whether the wines had been ſold on ac-
page 98] count of *Earle* the Plaintiff, or of *Eden* the Defendant in this indictment; and it then ſtated, that at the trial of that cauſe, *Eden* had ſworn, "I ſold them for Mr. *Earle*, never for myſelf:" in conſequence of which a verdict in that cauſe went in favour of *Earle*.

On the part of the proſecution, *Brett* was called as a witneſs. Before he was examined, *Erſkine* for the Defendant, aſked him, if he had paid the debt and coſts, in the action at the ſuit of *Earle*. He ſaid he had not, but that the bail had been fixed; upon which *Erſkine* objected to him as incompetent.

The Counſel for the proſecution inſiſted, that there being a judgment ſubſiſting againſt him, and beſide that the bail being fixed, that he was at all events liable, and ſo that the event of this proſecution could not avail him in any reſpect as againſt the judgment.

Lord KENYON ſaid, that it appeared to him, that in caſe the Defendant was convicted on this proſecution, that *Brett* would be relieved in a Court of Equity againſt the judgment, the verdict having been obtained on the ſole evidence of *Eden*: That therefore the conviction of *Eden* being the means of relieving him from the judgment, was an intereſt

interest which rendered him incompetent and he rejected him accordingly.

After the case had been nearly gone through, *Erskine* took an objection to the indictment for a variance. It was, that in the *Nisi Prius* roll, the indictment set out that 'the cause [of *Earle* v. *Brett*] came on to be tried before LLOYD Lord KENYON, Chief Justice of our said Lord the King, *William Jones* being associated, *&c.* whereas, in the judgment roll of that cause, it was that "*Roger Kenyon*" was associated, *&c. &c.* His Lordship ruled this to be a fatal variance, and directed an acquittal.

Variance between the judgment roll and the Nisi prius roll fatal where the former is to be given in evidence.

[page 99

Mingay and *Wigley* for the Prosecution.
Erskine for the Defendant.

HOPKINS *v.* NIGHTINGALE *et al.*

Saturday, Feb. 22.

TRESPASS *vi & armis* for breaking and entering the plaintiff's house.

What shall be deemed an outer door, which it is not lawful to break for the purpose of an arrest.

The Defendant pleaded, 1st. The general issue. 2dly, A justification, which was, that having a writ to take the body of the Plaintiff, that they entered for the purpose of making the arrest.

The Plaintiff replied *De inj. sua propria, &c.* that the Defendants in making the arrest had broken the *outer door* of his house.

The circumstances of the case were, that the

the Plaintiff's houſe ſtood in a ſtable-yard which was ſurrounded by a wall; there was
P. 100] a hatch gate at the foot of the ſtairs which led to an open gallery, from whence there were doors to the ſeveral apartments; at the top of the ſtairs was a door acroſs that part of the gallery, which led to the chamber where the Plaintiff was: the under part of the houſe was in ſtables. The Defendants having got admiſſion into the yard, went upſtairs and broke open the door at the top of the ſtairs and arreſted the Defendant. The queſtion was, Whether this was the outer door of the plaintiff's houſe or dwelling?

Lord KENYON was of opinion that it was, and directed a verdict for the Plaintiff.

Mingay and *Marryatt* for the Plaintiff.

Garrow for the Defendant.

IN THE COMMON PLEAS, SITTINGS AFTER TERM, AT GUILDHALL,

STANSFIELD *v.* JOHNSON.

Same day.

In cases of the sale of lands the auctioneer is not to be considered as the agent for both parties, and therefore his entering the name of the buyer of a lot of land in his book as the purchaser, is not a note in writing within the statute of Frauds.

THIS was a special action on the case.

The action was brought for not compleating a purchase of copyhold lands which had been put up for sale by auction; the Defendant was the best bidder, the lot was knocked down to him, and being asked his name, he said *Johnson*, and his name was written in the catalogue against the lot, as the purchaser. The deposit not being then paid was soon after demanded, but the Defendant refused either to pay it or to compleat his purchase, for which default the action was brought.

For the Defendant it was insisted, that this was a case within the statute of Frauds, 29 *Car.* 2. *c.* 3. § 4. which enacts, "That no action shall be brought to charge any person

p. 102] ſon on any contract for the ſale of lands, or any intereſt in them, unleſs the agreement ſhall be in writing, ſigned by the party or his agent."

The Counſel for the Plaintiff cited the caſe of *Simon v. Motivos*, 3 *Burr.* 1921. and inſiſted that the auctioneer was, under the authority of that caſe, to be deemed the agent of both parties, and his ſigning the name of the Defendant againſt the lot, a note in writing within the ſtatute.

Eyre Ch: J. was of opinion, that the caſe of *Simon* v. *Motives* applied to the ſales of goods only, which was a diſtinct clauſe of the ſtatute of Frauds, and that the preſent caſe was expreſsly within it, and the Plaintiff therefore could not recover.

It was then contended, that the Plaintiff had a right to recover on the money counts, for the money paid for the duty.

The Chief Juſtice thought not, but allowed a verdict to be taken for the Plaintiff, ſaving the point.

IN THE KING's BENCH, SITTINGS AT GUILDHALL, AFTER TERM.

YOUNG v. BAINER.

Wednesday, *Feb* 26*th*.

ASSUMPSIT for work and labour, &c. in painting a ship of which the Defendant was the owner. He pleaded in abatement that he was the joint owner of the ship together with others named in the plea, who ought to have been sued. Replication that he had undertaken *solely* to pay, &c. upon which issue was joined.

Where there are several partners and an action is brought against one of them another partner is inadmissible witness to prove he himself to be liable, as he is interested in the event of the suit, but a release will make him competent.

The Plaintiff proved the work done, and that it had been done by the Defendant's order, and that being applied to for payment before the action brought, that he had said, that he would call on the Plaintiff and pay him.

Mingay for the Defendant stated his defence to be, that the work had been ordered by one *Whytock* the master of the ship, who was also a part-owner, and he proposed to call *Whytock* to prove it, insisting that he was a good witness, as he was by his evidence to charge himself, inasmuch, as being master

he

[p. 104 he was liable to be ſued alone on his contract, for goods ordered on account of the ſhip.

But Lord KENYON ruled, that his teſtimony was inadmiſſible, for being a part-owner he was liable for his ſhare of the debt for which the action was brought, and the object of his teſtimony in this caſe was, to defeat an action brought to recover a demand, to which, if recovered, he was bound to contribute.

The Defendant offered to releaſe the witneſs.

Lord KENYON was of opinion, that that would not make him competent: and the Defendant had a verdict.

Erſkine and *Marryatt* for the Plaintiff.

Mingay and *Wigley* for the Defendant.

In the next term *Mingay* moved for a new trial on the ground that the releaſe would have made the witneſs competent: for that as in caſe the verdict went for the Plaintiff, the Defendant in this action would be ſolely liable to the Plaintiff, though he would have a right to call on the other part-owners for contribution, and he was willing to releaſe *Whytock* from his part of the contribution by a releaſe, that *Whytock* would thereby be made a competent witneſs.

Lord

Lord KENYON on the rule coming on, ſaid, that it appeared ſo then to him, and the rule for a new trial was made abſolute.

[p. 105

RUCKER *v.* CAMMEYER. *Same day.*

A broker who is employed to ſell goods for any perſon, and who agrees for the ſale of them, and give to the purchaſer and to his employer a ſale-note, is to be conſidered as agent for both parties, and ſuch note is a ſufficient note in writing within the ſtatute of Frauds.

ASSUMPSIT to recover the price of ten hogſheads of ſugar ſold by the Plaintiff to the Defendant.

The caſe as proved on the part of the Plaintiff was, that having a quantity of ſugars to ſell, that ſamples were ſent (as is uſual) to the Plaintiff's broker. The broker was called and proved, that the ſamples were ſent to him and expoſed together with other ſamples of different ſugars: that the Defendant examined the ſamples, and fixed on thoſe for which the action was brought: that he aſked the broker from whence the ſugars had come, and was anſwered, "that they came from the North—from *Scotland.*" He aſked the price, and was told 63*s.* *per* cwt. The broker ſaid further, that he afterwards brought the Plaintiff and Defendant together, when he ſuppoſed the bargain was concluded, as he ſoon after received orders from the Plaintiff to make out ſale notes of ten hogſheads to the Defendant at 63*s.* *per* cwt. The ſale notes he ſaid contained the price and quantity of the ſugar ſold, and that one of them was uſually given to the buyer and the other

to the ſeller. The Plaintiff, he ſaid, had his note from him, and the Defendant ſent for his, which was delivered to him, and ſoon after part of the ſugar, which he ſent back, ſaying, that he had contracted for new ſugars, but that theſe were old. He ſaid that at the time of the ſale, the Defendant made no inquiry whether the ſugars were new or old.

p. 106] *Erſkine* for the Defendant objected, that this contract was within the ſtatute of Frauds, he ſaid that the broker being the agent of *Rucker* the Plaintiff only, and there being no note in writing on the part of the Defendant, either by himſelf or any agent authoriſed by him, nor proof any direct and immediate contract of ſale with him, that it therefore was void under the ſtatute for want of a note in writing.

Lord KENYON ſaid, that it was of great importance not to break in on any deciſion which had taken place on the ſtatute of Frauds, and cited the caſe of *Simon* v. *Motivos*, 3 *Burr.* 1921, as ruling the preſent caſe. He ſaid that the broker muſt be conſidered as the agent of both parties, and need not be conſtituted by writing, but that in this caſe he had in fact given the defendant a note in writing when he gave him the ſale note, which he had accepted.

Bower and *Shepherd* for the Plaintiff.

Erſkine and *Holroyd* for the Defendant.

BOLTON v. REICHARD.

Saturday, March 1.

Where a person in payment of goods gives an order to pay the bearer the amount in good bills on London, and the party takes bills to the amount, he does it at his own risk.

ASSUMPSIT for goods sold and delivered.—The parties lived at *Liverpool*, and the case stated and proved on the part of the Plaintiff was, that the Defendant having bought a quantity of mohogany from the Plaintiff, he gave him a draft on *Caldwell* and Co. for the amount; the draft was an order on *Caldwell* and Co. to give to the plaintiff a good bill on *London* at 70 days to the amount of the value of the goods. *Caldwell* gave the Plaintiff his bill on *Burton, Forbes* and *Gregory*, which the Defendant accepted: before the bills became due, *Burton, Forbes* and *Gregory* became bankrupts. [p. 107]

The Plaintiff contended, that these bills having been bad, could not be deemed as payment for the goods, and that the Defendant was still liable to the amount.

For the Defendant it was insisted, that the Plaintiff had accepted the bills in question at his own risk, and that he therefore could not now resort to the demand for the goods sold.

Lord KENYON said, that under the order given by the Defendant to *Caldwell*, that it became incumbent on the Plaintiff to take care that he got good bills; the order saying, "Give to *Bolton* bills on *London* at 70 days" meant *good bills*; that he therefore took them at his peril, and their having eventually turned out bad, should not give him a right to waive all the intermediate transaction

transaction and have recourse to the demand for the goods sold. He therefore directed the jury to find for the Defendant, which they did.

Erskine and *Baldwin* for the Plaintiff.

Bearcroft and *Bower* for the Defendant.

p. 108]

Same day.

STEWART et al. Assignees of —— Bankrupt *v*, RICHMAN.

A concerted act of bankruptcy cannot support a commission.

TROVER for a quantity of malt, by the Plaintiffs as assignees.

Lord KENYON said that it was not now to be questioned, whether if a trader by concert with his creditors, commits an act of bankruptcy, that such can be good to support a commission; that whatever idea of policy or propriety first suggested it, and though it might appear that a commission of bankruptcy is the most equitable mode of dividing the bankrupt estate among his creditors, that it was now settled, that a trader could not legally concert an act of bankruptcy with his creditors.

A creditor having proved a debt under a commission of bankrupt shall not prevent him from impeaching the commission in an action brought against himself.

His Lordship further ruled, that if a creditor of a bankrupt obtains money or goods from the bankrupt before his commission sued out, in part discharge of his debt, and proves the remainder under his commission, that if an action is brought by the assignees to recover back the money or goods so obtained,

that

that the creditor having ſo proved his debt under the commiſſion, ſhall not prevent him from diſputing the validity of the commiſſion, in defending the action.

Erſkine and *Maryatt* for the Plaintiff.

Mingay for the Defendant.

NAYLOR *v.* MANGLES et al.

Monday, March 3d.

A wharfinger has a lien on goods brought to his wharf for the balance of a general account.

ASSUMPSIT for money had and received.

The Plaintiff had purchaſed from one *Boyne* twenty-five hogſheads of ſugars then lying in the Defendant's warehouſes, who was a wharfinger. *Boyne* was in debt to the Defendant to the amount of 167 *l.* part of which only was for the charges of theſe twenty-five hogſheads of ſugar, the remainder was for the balance of a general account, for which the Defendant claimed a lien, and refuſed to deliver them to the Plaintiffs till the whole ſum was paid. The Plaintiffs paid him the whole money and then brought this action to recover it back.

The whole queſtion turned upon the point whether a wharfinger had a lien for the balance of a general account upon the goods in his poſſeſſion.

The counſel for the Defendant ſaid, that it had been decided in three different caſes that they had, and called witneſſes to prove it,

it, with which the jury ſeemed compleatly ſatisfied.

Lord KENYON ſaid, liens were either by common law, uſage, or agreement. Liens by common law were given where a party was obliged by law to receive goods, &c. in which caſe, as the law impoſed the burden, it alſo gave him the power of retaining, for his indemnity. This was the caſe of inkeepers
p. 110] who had by law ſuch a lien. That a lien from uſage was matter of evidence. The uſage in the preſent caſe had been proved ſo often, he ſaid it ſhould be conſidered as a ſettled point, that wharfingers had the lien contended for.

Bearcroft, *Shepherd* and *Park* for the Plaintiff.

Erſkine for the Defendant.

Same day.

DIXON *v.* PARKES et al.

Where the obligee of a bond receives the whole principal after it is payable, he cannot recover intereſt in an action on the bond as SOLVIT POST DIEM is a good plea.

THIS was an action of debt on a *reſpondentia* bond given in the *Eaſt-Indies*. Pleas of *Non eſt factum & ſolvit poſt diem*.

The bond was payable 21 days after the ſhip's arrival at *Canton*, but if not then paid there was reſerved an increaſe of intereſt. The ſhip arrived at *Canton*, but the bond was not paid for three months after the 21 days, when the Defendant paid the principal and intereſt

intereſt up to the 21 days, but would not pay the increaſed or any intereſt for the 3 months; to recover which was the object of the preſent action.

Lord KENYON ruled, that the Plaintiff could not, in the preſent form of action, recover the intereſt, having received the principal. He ſaid, that this was a plea under the ſtat. 16 *Ann.* which allows a payment to be made after the day, and that it may be pleaded in bar: that the jury give the intereſt in the form of damages, but there muſt be ſomething to ſupport them: that here the principal having been paid, for *it* there could be no verdict: that that being gone, every thing founded on it muſt go too, therefore no damages could be given in the preſent caſe, the claim for which alone was the foundation of the preſent action. If the Plaintiff meant to have demanded further damages, he ought not to have received the principal; as a tender after the day without payment was not pleadable in bar under the ſtatute, in which caſe he could in the preſent action, have recovered the whole principal and increaſed intereſt. [p. 111

The Plaintiff was nonſuited.

Erſkine and *Barrow* for the Plaintiff.

Mingay and *Morgan* for the Defendant.

Tuesday, March 4th.

EAST-INDIA COMPANY *v.* HENSLEY.

Where a man appoints a general agent, he is bound by all his acts, elitcr where he appoints an agent for a partic ular purpoſe only, there the principal is only bound to the extent of the authority given.

THIS was an action on the caſe to recover damages for the loſs ariſing from the re-ſale of a certain quantity of raw ſilk ſold by the Company at one of their ſales to the Defendant.

p. 112] The ſilk had been bought by one *Briggs*, a broker, for the Defendant, and the defence ſet up by the Defendant was, that his orders were to *Briggs* to buy the beſt *Bengal* raw ſilk, whereas this was not raw ſilk, nor of the beſt quality.

Lord KENYON took the diſtinction between a general and ſpecial agent; that in the firſt caſe the principal muſt be bound by all his acts, whereas in the latter he is only bound, while the agent acts within the ſcope of his authority, and that if in the preſent caſe the Defendant could prove that he had ſo ſpecially authoriſed *Briggs* to bid for him for beſt *Bengal* ſilk, and this turned out to be not of that deſcription, that he ſhould not be bound by his contract ſo made without his authority; but that *Briggs* ſhould be liable to an action at the ſuit of the Company for his abuſe of it.

Bearcroft, *Rous* and *Wood* for the Plaintiff.

Erſkine and *Shepherd* for the Deſendant.

MERTENS *v.* WINNINGTON.

Same day.

ASSUMPSIT against the Defendant as drawer of a bill of exchange.

Where a person takes up a bill of exchange for the honour of any one whose name is on the bill, he becomes as indorsee of the bill, and intitled to all remedies against those whose names are on it.

The bill in question was drawn by the [p. 113
Defendant on *Carrioni* in *Italy*, in favour of *Webbould*: *Webbould* indorsed it to *Burton*, *Forbes* and *Gregory*, they sent it to their correspondent in *Holland*, who sent it to *Italy*, where it was presented to *Carrioni* for payment, who refused it; upon which the Plaintiffs, who were merchants resident at *Venice* paid the bill for the honour of *Burton*, *Forbes*, and *Gregory*, and now brought their action against the Defendant as drawer.

The counsel for the Defendant contended, that where a bill is taken up for the honour of any of the parties whose names are on it, that such person only shall be liable.

But Lord KENYON was of opinion, that where a bill is so taken up, that the party who does so, is to be considered as an indorsee paying full value for the bill, and as such entitled to all the remedies to which an indorsee would be entitled, that is, to sue all the parties to the bill, and he therefore directed the jury to find a verdict for the Plaintiff.

Bearcroft and *Baldwin* for the Plaintiff.

Erskine and *Lawes* for the Defendant.

Friday, March 8th.

SMITH and Others *v.* JAMESON.

Where there are more assignees than one of a bankrupt estate, one of them may receive money belonging to the bankrupt estate, and give a good discharge for it.

THIS was a case directed by the Lord Chancellor for the opinion of the Court of King's Bench. The principal point of which being reserved for argument, is not here inserted.

It was an action for money had and received.

The Defendants had been partners in trade; while they were in partnership one of them being assignee to a bankrupt estate had used part of the money belonging to that estate, in the partnership trade, without the knowledge or acquiescence of the other assignees who were the Plaintiffs in the present action, but with the knowledge of his partner that the money was part of the bankrupt estate.

In *December* 1792, the partnership was dissolved, and the partner who was the assignee continued in the business, and received from the other, money and effects sufficient to discharge all debts due by the partnership, including the money of the bankrupt estate, of which they had had the use.

It then became a question, whether this was a repayment to the partner who was assignee, and so should discharge the other.

Lord KENYON was of opinion, that one assignee of a bankrupt estate might receive the

the monies belonging to the eſtate and give a legal and valid diſcharge for it. [p. 115

Erſkine, *Bower* and *Ruſſell* for the Plaintiffs.

Bearcroft, *Law* and *Eſpinaſſe* for the Defendant.

COORE *v.* CALLAWAY.

Same day,

ASSUMPSIT for goods ſold and delivered. There was a plea of a tender and replication of a ſubſequent demand and refuſal, which was the iſſue in the caſe.

Where the iſſue is on a ſubſequent demand and refuſal to a plea of tender the demand must be by a perſon who had authority to receive it.

To prove the ſubſequent demand and refuſal the clerk to the attorney in the cauſe was called. He was aſked by what authority he had gone to make a demand of the money; he ſaid, he had been ſent by his maſter for the purpoſe, and had ſo repreſented himſelf to the Defendant when he demanded the money.

Lord KENYON ſaid, that on an iſſue of this ſort turning on the demand, that it ſhould appear that the perſon who made the demand was properly authoriſed to receive the money that though payment to the attorney while an action was ſubſiſting was good, that it was otherwiſe to his clerk who ſhewed no authority but his maſter's orders to demand it. His Lordſhip ſaid, he recollected a caſe where

The clerk to the attorney in the cause is not a perſon of that deſcription.

a per-

a perſon having refuſed to take a conveyance executed by one having a power of attorney for the purpoſe, it was held to be lawful for him to refuſe a conveyance ſo executed, as it multiplied his proofs. He thought therefore that in the preſent caſe the Defendant was not bound to pay the money to a perſon coming under the circumſtances of the witneſs as his repreſenting himſelf as clerk to the attorney, and that he had been ſent by him for the purpoſe of demanding it, was not a ſufficient authority to receive, and therefore warranted the Defendant in refuſing to pay the money, and that that evidence therefore did not maintain the iſſue.

The demand of the ſum ought to be of the ſum for which the action is brought.

In the courſe of the examination of this witneſs, he was aſked, what ſum he had demanded from the Defendant, he ſaid, the debt, and half the coſts of a former action which had been commenced againſt the Defendant by a wrong name, but which had been diſcontinued.

It was contended, that this demand was irregular and inconſiſtent with the iſſue, it not being of the ſpecific debt, but of another ſum which the Defendant was not bound by law to pay. It was anſwered, that he had agreed to pay one half of the coſts, of that action which had been diſcontinued.

Lord KENYON ſaid, it was *nudum pactum*, and the demand therefore not a proper one. He therefore nonſuited the Plaintiff on both grounds.

Erſkine and *Lambe* for the Plaintiff.

Garrow for the Defendant.

IN THE COMMON PLEAS,

SITTINGS AT GUILDHALL,

AFTER MICHAELMAS TERM

33 GEORGE III.

PUGET DE BRAS *v.* FORBES & GREGORY.

ASSUMPSIT by the Plaintiff as payee of a bill of exchange againſt the Defendants as drawers.

Where by the cuſtom of trade bills are given before the money is received if the payee's agent who was to pay the money, becomes inſolvent before the money is received, the drawer is not liable on the bill.

The Plaintiff in this caſe was a foreigner reſiding in *Holland*, and having a large ſum of money here in the funds, employed the houſe of *Agaſſiz Rougemont* and Co. as his agents to ſell it out, and to remit it to him in bills on *Holland*.

Agaſſiz Rougemont and Co. applied to the Defendants for the purpoſe, and on the 17th of *February* 1792 got from them bills on *Holland* in favour of the Plaintiff. It was proved to be the cuſtom of *London* for perſons in the habit of remitting foreign bills, to give the bills on one day, but not to receive the

the money from them till the next poſt day. In this caſe the next poſt day was *Tueſday*, *February* the 21ſt. On *Monday* the 20th. the houſe of *Agaſſiz Rongemont* and Co. ſtopped payment, ſo that the Defendants in fact had never received any value for the bills which they had ſo drawn on *Holland* in favour of the Plaintiff, and they having ordered their correſpondent obroad not to pay the bills when due, this action was brought againſt them as drawers of the bills.

The Plaintiff's caſe reſted merely on the law merchant knowing no *nudum pactum* and that it was proper that the Defendant ſhould have received the money before they granted the bills; and that in conſequence of their not having then received it, that *Agaſſiz Rougemont* and Co. having failed, that he had loſt the money of his they had ſold out of the funds.

The Defendants relied on the cuſtom of merchants in the remitting of the bills, and that they had been guilty of no laches. That the cuſtom of giving bills on *Holland* before the receipt of the money for them, was perfectly well known and eſtabliſhed, and that they therefore ſhould be allowed to go into that defence againſt the Plaintiff, who was the payee of the bills.

Lord LOUGHBOROUGH was of opinion that it was competent for the Defendants to go into this evidence as againſt the payee of the bills,

bill's, he being ſubject to all the equity the Defendants could have had againſt his agents *Agaſſiz Rougemont* and Co. if the bills had been drawn payable to themſelves, who muſt be ſuppoſed to have been acquainted with the [p. 119 uſage on bills. Though his Lordſhip ſaid, that ſuch evidence would be inadmiſſible had the action been brought by an indorſee for a valuable conſideration.

The Defendants had a verdict.

Adair Serj. for the Plaintiff.

Law for the Defendants.

IN THE COMMON PLEAS.
SITTINGS AFTER HILARY TERM, 33 GEORGE III.

LAMBERT *v.* ROBINSON.

THIS was an action of trover for a parcel of goods which came by the *Tunbridge* waggon to the Defendant's inn, where the waggon put up.

When goods are taken by the owner from the waggon, the carrier or ware-houſe man has no claim for booking or warehouſe room. There is in ſuch caſe no lien by law.

The caſe was, that the goods in queſtion had been taken up on the road; and when the waggon arrived at the inn, the Plaintiff who was owner, was there ready to receive them.

them. The carriage came to 3 *s.* 6 *d.* which the Plaintiff then tendered. The Defendant refuſed to deliver them till paid a further ſum of two-pence *per* parcel for booking.
p. 120] This the Plaintiff refuſed to pay, as the goods had not been booked, having been only taken from the waggon to the ſcales, where they were weighed in order to aſcertain the ſum to be paid for the carriage, and there received by the owner. It was then demanded as ware-houſe room, and refuſed on the ſame principle, as the goods had never been brought into the houſe, but delivered from the waggon. The Defendant perſiſted in holding them until the two-pence was paid, upon which the preſent action was brought to recover them.

It was held by EYRE Chief Juſtice, that the Defendant had ſet up no colour of title to warrant him in holding the goods, as there was no lien given by Law in this caſe. But that even admitting that by law he had a lien, it muſt be for ſome legal demand. That in the preſent caſe, the demand was an exaction, as the Defendant could not claim a ſum where there was no duty performed; in this caſe, there having been no entry in the books, nor warehouſe-room occupied. He therefore directed a verdict for the Plaintiff.

Adair Serj. for the Plaintiff.

Bond Serj. for the Defendant.

CROFT *v.* SMALLWOOD. p. 121]

Same Sitting.

What promiſe is not within the ſtatute of frauds.

THE declaration in this caſe ſtated, That the Plaintiff, who carried on the buſineſs of a tailor, being applied to by one *George Foſter* to be ſupplied with certain cloaths and wearing apparel, before that time made by the Plaintiff, but which were ſtill in his poſſeſſion, was unwilling to deliver them to the ſaid *Foſter* upon the credit of the ſaid *Foſter*, and refuſed ſo to do; but that in conſideration that the Plaintiff, at the ſpecial inſtance and requeſt of the Defendant, would deliver the ſaid cloaths to the ſaid *G. Foſter*, the Defendant undertook and promiſed to pay, and then averred the delivery to *Foſter*.

The witneſſes called on the Part of the Plaintiff, proved, that the cloaths had firſt been ſent home to *Foſter*, by the Plaintiff's foreman, he being then out of town; that *Foſter* not having paid for them as he promiſed, the foreman prevailed on him to let him have the cloaths again; and that ſoon after the Defendant came to the Plaintiff's ſhop, and ſaid, that if he would ſend the cloaths again to *Foſter*, that he would pay. It was alſo proved, that the Defendant being ſometime after applied to for payment, ſaid it was not then convenient to him, but that he had a bill would ſoon be due, when he would pay.

The counsel for the Defendant objected, That this case was clearly within the statute of frauds: that the principle, as established by the case of *Matson* v. *Wharam*, 2 Term. Rep. 80. was, that wherever the party who receives the goods is himself in any wise liable, that there in order to charge a third person on his undertaking that a note in writing is necessary. That there could be no doubt that in this case *Foster* was liable, and the original credit given to him.

p. 122]

EYRE Ch. J. was of opinion, that the case was not within the statute of frauds, and that the whole credit was given to the Defendant, and that he was liable.

Marshall Serj. and *Lawes*, for the Plaintiff.

Adair Serj. and *'Espinasse*, for the Defendant.

IN THE KING's BENCH. SITTING AT WESTMINSTER, AFTER EASTER TERM. 28 GEORGE III.

MOLTON v. CHEESELEY.

In an action of debt to recover the penalties under the game laws, the plaintiff can recover but one penalty under the same statute.

THIS was an action of debt * brought to recover from the Defendant two penalties of 5*l.* each, under the statute 5 *Ann.* 14. The first was for having a pheasant in his possession, he not being a person qualified by the laws of the realm to kill game. The second was under another clause of the same statute, for keeping a dog for killing and destroying the game, which inflicts a penalty of 5 *l.* on the offender.

When the case was opened, Mr. Justice BULLER ruled that the Plaintiff could go for one penalty only; for that both being offences in the same act of parliament for which penalties are given that the Plaintiff can recover but one penalty under the same statute

* By stat. 8 Geo. 1. 19. "Where any person shall be liable to any penalty under the Game Laws, by conviction before a justice of peace, it shall be lawful for any person either to proceed to recover the said penalty by information before a justice, or to sue for the same by action of debt"

The

p. 124]

If a perſon not qualified to kill game kills a pheaſant or other game by accident, he cannot take it away, or he is ſubject to the penalty.

The caſe then proved on the part of the Plaintiff was, that a pheaſant had been killed by accident by the Defendant's dog, but that he had carried it away.

BULLER Juſtice ſaid, that if it appeared that the bird was killed by accident, that that was no offence, but that in ſuch caſe it ſhould be left where it was killed; for if it was taken away, it ſubjects the party to the penalty for having game in his poſſeſſion.

The Plaintiff therefore recovered one penalty of 5 *l.* for this offence.

IN THE KING's BENCH.

p. 125]

SITTINGS AT GUILDHALL,

AFTER TRINITY TERM

30 GEORGE III.

REX *v.* DOYLE.

If the trial of an indictment for perjury is put off on the application of the defendant, he must pay the costs of the day.

THIS was an indictment against the Defendant for perjury.

When the cause was called on, the Defendants counsel moved to put off the trial till the following term, on an affidavit of the absence of two material witnesses. The motion was not opposed by the counsel for the prosecution but they insisted that they were intitled to the costs of the day. The counsel for the Defendant contended that the rule of giving the costs of the day in the case of an application of this nature, was confined to civil cases only, not to criminal ones.

But Lord KENYON ruled, that the prosecutor was intitled to his costs, and cited a case of the *King* v. *Vaughan*, where the question had so been decided.

In

[p. 126

In such case the prosecutor is not entitled to any costs on his own account, unless his name appears on the back of the bill.

In the *Michaelmas* term following, when the Master came to tax the costs, the prosecutor claimed a large sum for his costs, loss of time and other charges, he being an attorney. The Master refused to allow him any, his name not appearing upon the back of the bill. Upon which he obtained a rule to shew cause why the Master should not review his taxation, and make him the allowances claimed.

The counsel for the Defendant insisted, that the only claim the Defendant could have must be, that he was a witness in the cause: That the order of *Nisi Prius* giving the prosecutor the costs of the day, included only the charges of the witnesses and counsel's fees: That his name did not appear on the bill, and that he therefore could not be deemed a witness, nor be entitled to his costs.

On the other side it was contended, that this case should be governed by the rule which would be adopted in taxing costs, under stat. 5 & 6 *W.* & *M.* where if the Defendant is found guilty, the prosecutor is entitled to his costs as the party grieved, and cited *Rex* v. *Goter*, 2 Term Rep. and *Rex* v. *Smith* 1 *Burr*.

But the Court held, that these cases only applied where the indictment was under the statute, and that the prosecutor was not intitled to his costs, and so discharged the rule.

Bearcroft Bower and *'Espinasse* for the Prosecution.

Erskine and *Garrow*, for the Defendant.

IN THE KING's BENCH. [p. 127

SITTINGS AT WESTMINSTER.

AFTER EASTER TERM,

31 GEORGE III.

REX *v.* DORAN.

THE Defendant was indicted for ſetting her houſe on fire.

To prove an inſurance from fire at a public office, the policy itſelf muſt be produced.

To prove that the houſe was inſured, the books of the Fire Inſurance Office were produced, in which was an entry to that effect.

The Defendant's counſel objected to this evidence, as there had been no notice given to produce the policy.

Lord KENYON ruled, that as the policy was the beſt evidence, the proſecutor could not give any evidence from their books, it being inferior evidence unleſs notice had been given to produce the policy; and accordingly rejected it.

INDEX.

A.

Agent.

THE principal is bound by all acts of a general agent— *aliter* of a ſpecial one, as far only as he acts within his power Page 11

Agreement.

Where an agreement is to be performed by a certain day, if the parties enlarge the time by conſent, performance on the enlarged day may be given in evidence, under a declaration on the agreement as it ſtood at firſt 53

Arreſt.

In an action of falſe impriſonment for an illegal arreſt, it is evidence to charge the defendant the officer that the warrent was directed to him 42

Where a perſon is arreſted, the officer on receiving a diſcharge from the plaintiff in that action, may detain the defendant for a reaſonable time, till he ſearches the office 45

An outer door to an open gallery leading to ſeveral apartments cannot be broke open to make an arreſt page 99

Aſſault.

In an action for an aſſault, if *ſon aſſault* is pleaded, and the day is material for the plaintiff, he muſt new aſſign, or the defendant ſhall have a verdict in caſe he can prove an aſſault on any day preceding the ſuing out the writ 38

Aſſumpſit.

Aſſumpſit will not lie for goods ſold and dilivered, where the buyer has given a bill or note which has ſome time to run, till that time is expired 5

Aſſumpſit for uſe and occupation will not lie when the premiſes are let for an unlawful purpoſe, or *contra bonas moros* 13

Aſſumpſit will lie to recover money lent knowingly to game with, if no ſecurity has been taken 22

B.

Banker.

Bankers have a lien on bills depoſited with them for the balance of a general account. page 66

Bankrupt.

The commiſſioners of bankrupt may make a verbal order for the allowance of his expences to a perſon ſummoned before them; and ſuch ſhall be recoverable in aſſumpſit 64

Q. Whether the wife of a bankrupt is an admiſſible witneſs to prove a payment made in contemplation of a bankruptcy 67

A conveyance by deed to a child though declared to be void by ſtat. 1 *Jac.* 1, if made when a trader is inſolvent, is fraudulent, and an act of bankruptcy 68

Where one partner makes a fraudulent grand by deed to another partner, it is an act of bankruptcy in the former but not in the latter 71

A concerted act of bankruptcy will not ſupport a commiſſion 107

A creditor who proves a debt under a commiſſion of bankruptcy, may neverthleſs on a trial impeach it 108

An aſſignee of a bankrupt eſtate may receive money due to the eſtate and give a valid diſcharge for it page 114

Baron and Feme.

A wife muſt have a ſeparate maintenance ſecured to her by deed, in order to ſubject her to the payment of her own debts. 6

Where a huſband and wife live in a ſtate of ſeparation, an action for crim. con. will not lie for adultery committed during that period 16

Bill of Exchange.

If a bill or note is drawn payable at the houſe of a third perſon, a refuſal by that perſon is good evidence that the bill will not be paid 3

A letter delivered at the houſe where the acceptor of a bill of exchange or the drawer of a note lives, is ſufficient notice of non-payment of it 5

When a bill or note which has ſome time to run, is given in payment of a debt, an action is not maintainable for the debt till the time is expired which the bill or note had to run ibid.

Aliter if the bill or note was of no value. ibid.

In an action againſt the maker of a note by the indorſee, the indorſor's letters not evidence

videnee to impeach the plaintiff's title to it. page 10
How far the evidence of a clerk in the poſt-office, whoſe buſineſs it is to diſcover the forgery of franks, is evidence of forgery in the acceptance of a bill of exchange p. 14
That a witneſs has ſeen the acceptor write his name pending the action is not ſufficient evidence of the acceptance. when the defence is that it has been forged 15
It is not ſufficient evidence of the acceptance of a bill of exchange, that the Defendant to whom the bill was addreſſed as acceptor returned it ſaying, "There is your bill it is all right" 17
If a party in diſcount of a bill gives goods in part, and charges them at much above their value, it is uſury 40
If any alteration is made in a bill of exchange after the time it is payable, it requires a new ſtamp, or it ſhall be void 81
The indorſor of a bill of exchange cannot be a witneſs to prove the property of the bill in himſelf, in order to defeet the action by the indorſee 85
If a perſon makes a payment by an order, directing the perſon to whom it is addreſſed to pay in good bills, the perſon taking the bill does it at his peril page 106
When a bill of exchange is taken up for the honour of any of the parties whoſe name is on the bill, ſuch perſon becomes as an indorſee and is intitled to all the remedies an indorſee could have againſt thoſe whoſe names were on the bill 112
When the drawer of a bill of exchange has not received the conſideration of it, he ſhall not be liable in an action by the drawee 117

Books.

Entries in the books of merchants bankers &c. can only be proved by the clerk who made them 1
Even tho' the clerk is abroad 1

Bond.

Execution of a bond may be proved by proving the handwriting of the ſubſcribing witneſs, when ſuch witneſs is abroad 2
If the obliger of a bond acknowledges to the ſubſcribing witneſs that he executed it, it is ſufficient 9
When the principal of a bond has

has been paid, the obliger cannot recover intereſt in an action of debt on the bond page 110

C.

Carrier.

A carrier cannot diſcharge himſelf from loſſes ariſing from the act of God, or of the King's enimies, by giving notice to that effect 36
Where goods are brought by a carrier, if taken from the waggon, the owner may take them, nor can any claim be made for warehouſe room or booking 119

Coſts.

If a Defendant in an indictment applies to put aff a trial, ſtanding in the paper for trial, he ſhall pay coſts 125
The proſecutor of an indictment is not a witneſs entitled to his coſts under an order made as above, unleſs his name appears on the back the indictment 126

Covenant.

Covenant not to aſſign or underlet without leave of the leſſor firſt had and obtained, is a fair and uſual covenant 8
In an action of covenant under the general iſſue, the defendant ſhall not be allowed to give in evidence what amounts to a licence page 35

Court.

Vide JURISDICTION.

D.

Deed.

Muſt be proved by the ſubſcribing witneſs; the party cannot acknowledge it himſelf in court 89
Where a deed is executed by a power of attorney, the power ought to be produced in evidence 90

Evidence.

Entries in the books of merchants and traders can only be proved by the clerk who made them, nor is other evidence admiſſible, tho' he is abroad. 1
Sentence of the ſpiritual court, how far evidence of a divorce *a menſa & toro* 6
In an action againſt the maker of a note, letters of the indorſer are not admiſſible evidence to impeach the indorſee's title to the note 10
Evidence from compariſon of hands not admiſſible 14

How

How far the evidence of a clerk of the poſt-office, whoſe buſineſs it is to diſcover the forgeries of franks, is admiſſible page 14
That the warrent was directed to the defendant is *prima facie* evidence, to charge him in an action of falſe impriſonment for an arreſt made under it 42
A record is not evidence, unleſs it appears that the matter was in iſſue which the record is brought to prove 43
To prove the loſs of profits of the theatre from the giving up of the boxes, the box-keeper is a good witneſs, but not to prove that they were given up for any particular cauſe 49
In trover for a bill of exchange it is neceſſary to give notice to produce it, or the plaintiff can go into evidence of its loſs 50
Signing a paper as a witneſs, is not ſufficient to bind the witneſs with notice, unleſs it is proved that he knew the contents 57
In an action of malcious proſecution, a Judge's order to ſtay proceedings upon payment of coſts in the firſt ſuit and prove of ſuch payment is not ſufficient evidence to ſhew the firſt ſuit determined page 79
In an action againſt the Sheriff for not taking a bail bond, if bail is put in and juſtified pending the action, and the plaintiff does not move to ſet aſide the juſtification of bail the plaintiff cannot recover 87
A party who has executed a deed, ſhall not be allowed to acknowledge it; it muſt be proved by the ſubſcribing witneſs 89
When a party executes a deed under a power of attorney, the power of attorney ought to be produced 90
The execution of a bond may be proved by a witneſs to whom the obligor acknowledged that he had ſigned it and ſealed it, but who did not ſee him do it 97
Where the record of a former trial is to be given in evidence, and is ſet out in an indictment, it is a fatal varience if the name of the aſſociate is different 98
To prove that a houſe was inſured, the policy muſt be produded; an entry in the books of the inſurance company is not ſufficient 127

F.

Frauds, Statute of.

Sales of land by auction, wherein there is no note in writing, but the auctioneer only puts down the name of the buyer in his book, is within the ſtatute of frauds page 101

In the caſe of ſales by the intervention of a broker, when he delivers to the buyer a ſale note, is good within the ſtatute of frauds 104

Freight.

The conſignee is always *prima facie* liable for freight 23

G.

Game.

In an action of debt to recover the penalties under the game laws, the Plaintiff can go but for one penalty in the ſame ſtatute 123

A party not qualified, liable to the penalty for having game in his poſſeſſion, though it was killed by his dog by accident 123

Gaming.

Money lent knowingly to game with, but without any ſecurity, is recoverable in aſſumpſit page 22

H.

Hand-writing.

Vide WITNESS.

It is not ſufficient that a writing is not the hand-writing of a perſon, That the witneſſes knowledge of it is from having ſeen the party write while the action was depending 15

I.

Impriſonment.

In an action of falſe impriſonment againſt an officer, it is evident to charge him that the warrant was directed to him 42

When a Defendant is in cuſtody on *meſne* proceſs, and a diſcharge comes from the Plaintiff, the officer is not obliged to diſcharge him immediately, but ſhall have time to ſearch the office 45

Infant.

If a tailor truſts a young man under age for cloaths to an extravagant degree, he cannot recover; though for a more

more moderate charge he might recover them as for neceſſaries page 17

Inſurance.

When a ſhip ſuſtains a partial loſs, the inſured cannot abandon: nor is the anſwer of the inſurers, deſiring them to do the beſt they could for the damaged property, evidence of their aſſent to make it a total loſs 73

In a policy of inſurance, the underwriters do not inſure againſt the difference of exchange 77

Where one perſon ſubſcribes a policy with the name of another, proof of his having done ſo in many inſtances will be ſufficient evidence to charge the principal. 61

If a party undertakes to make an aſſurance for another without any conſideration, if he takes any ſteps toward it, but does it ſo unſkilfully that the party can have no benefit, caſe will lie for the neglect 75

Intereſt.

Where the principal has been paid on a bond, the obligee cannot recover the intereſt in an action of debt on the bond page 10

Juriſdiction of Court.

When the offence has been committed in foreign parts, the Court of King's Bench has no juriſdiction without an act of Parliament for the purpoſe. 2

But if any part of the offence has been compleat in England, in ſuch caſe it has juriſdiction 63

L.

Leaſe.

Vide TENANT.

Libel.

It is not a libel for the editor of a public newſpaper to comment fairly on any place of public entertainment, or on any public performer 28

Aliter if done maliciouſly and untruly 29

Caſe will not lie by the proprietor of a place of public amuſement for libelling a performer who was thereby prevented from appearing, by which he loſt the profits of the performance 48

Lien.

Lien.

Bankers have a lien upon bills depoſited with them for the balance of a general account page 65

A wharfinger has a lien on goods brought to his wharf for the balance of a general account 108

There is no lien on goods brought by a carrier to an inn, if the price of carriage is tendered for warehouſe room or booking 119

Lottery.

In debt on the Lottery Act, to recover the penalties for illegal inſurances, the Plaintiff can go only for as many penalties as he has ſworn to in his affidavit to hold the Defendant to bail 34

In debt on the Lottery Act, if one count in the declaration avers that the defendant inſured a certain number in the Lottery, in conſideration of a certain ſum paid, and the evidence proves that the ſum paid was for the inſurance of ſeveral numbers, it is a variance 58

But if the count ſtates the inſurance of a certain number, but mentions no ſum paid for the inſurance, and the evidence proves a ſum paid, it is not a variance page 59

M.

Malicious Proſecution.

To prove the firſt ſuit determined in an action of malicious proſecution, a judge's order to ſtay proceedings upon payment of coſts and proof of payment, is not ſufficient 79

Mortgage.

If a mortgagee uſes timber on the mortgaged premiſſes which has been furniſhed to the mortgagor but not paid for, he ſhall be liable in an action of trover though he is afterwards evicted from the poſſeſſion 93

N.

Notice.

A notice to quit ſhall be governed by the taking, ſo that on a taking by the month, a month's notice is ſufficient 94

P.

Partners.

Partnerſhip may exiſt in a particular concern or buſineſs, and bind the parties to matters only connected with it 29

If a perſon repreſents himſelf as a partner, tho' in fact he is not ſo, he ſhall be liable to credits given on ſuch account page 30

If a witneſs comes to charge himſelf on a contract for goods for which another is ſued, the Plaintiff by ſuggeſting merely that the witneſs is a partner with the Plaintiff, cannot deprive the Defendant of the benefit of his teſtimony 40

A debt due to two partners may be ſet off by the ſurvivor to an action brought againſt himſelf 47

When one partner makes a fraudulent grant by deed to another partner, it is an act of bankruptcy in the former, but not in the latter 71

In an action againſt one partner only, another partner is an inadmiſſible witneſs to prove himſelf liable without a releaſe 103

Perjury.

On an indictment for perjury in what the Defendant as a witneſs ſwore on trial, the party againſt whom the verdict went in conſequence of ſuch teſtimony, is inadmiſſible till he has paid the debt and coſts in that action page 97

Pleadings.

If the Defendant has a defence to an action of covenant that the breach was by licence of the Plaintiff, he muſt plead it and cannot give it in evidence under the general iſſue 35

In an action of aſſault if the day is material and the Defendant pleads *ſon aſſault* the Plaintiff muſt new aſſign 38

R.

Record.

Records not evidence except of matters appearing on the face of them to have been in iſſue 43

Rent.

Vide TENANT.

Replevin.

In replevin receipt of rent is title, and a party who comes in as tenant with notice to a certain perſon is his landlord, cannot conteſt his title in replevin 91

S.

Sales.

Sales of lands by auction when the auctioneer puts down the name of the buyer, it is not a note in writing within the ſtatute of frauds. page 101

When a ſale of goods is by a broker employed by the ſeller and he makes a bargain, and delivers to the buyer a ſale note, it is good to bind the ſale within the ſtatute of frauds page 104

If a party buys goods by a broker and he does not act within his authority, the principal is not bound by his acts 111

Seal.

In ejectment on a leaſe by the city of London, the ſeal of the city, proves itſelf 53

Set-off.

A debt due to one as ſurviving partner may be ſet off to an action brought for a debt in his own right 47

When a perſon threatned to be diſtrained pays money tho' it is more than can be claimed, it ſhall not be deemed a payment by compulſion nor be allowed in a ſet-off, becauſe he might have had a replevin page 84

Smuggling.

If a foreign merchant ſells goods abroad knowing that they are to be ſmuggled into England and aſſiſts in it, he cannot recover their amount 91

Stage-Coach.

A perſon paying the whole fare of a ſtage-coach may take his place at any place he thinks fit, *aliter* if he only pays a depoſit 27

Stamp.

Any alteration in an inſtrument requiring a ſtamp makes it a new Inſtrument, and a new ſtamp neceſſary 81

T.

Tenant.

When a leaſe is expired the tenant ſtill continues liable to the rent unleſs he delivers up compleat poſſeſſion of the premiſes, or the landlord accepts another in his room 57

Signing

Signing a notice by the landlord by which a tenant whose leaſe is expired orders his under-tenant to pay his rent in future to the landlord is not evidence of his agreement to accept the under-tenant as his tenant unleſs it is proved that he knew the contents of the notice ibid
Where a tenant has, (on coming into poſſeſſion under an aſſignment) notice that the lands are held under a certain perſon to whom the former tenant has paid rent, the title of ſuch perſon cannot be conteſted in an action of replevin 31
Notice to quit is governed by the taking, ſo that on the taking by the month a month's notice to quit is ſufficient page

Tender.

Where there is a plea of a tender, and a replication of a ſubſequent demand and refuſal, the party who has made the demand muſt appear to be legally authoriſed 113
The clerk to the attorney in the cauſe is not ſuch a perſon ibid.
The demand in ſuch caſe ought to be of the ſum really due page 114

Treſpaſs.

Treſpaſs vi et armis, lies for killing the Plaintiff's horſe though the injury aroſe from negligence 55
When a door is at the end of an open gallery leading to ſeveral apartments it is the outer door to ſuch apartments and cannot be broke open to make an arreſt 99

Trover.

Demand in writing left at the houſe ſufficient in trover 23
A demand of payment for goods a ſufficient demand in trover 31
In trover for a bill of exchange the Plaintiff muſt give notice to the Defendant to produce it or he cannot go into evidence of his caſe 50
Where the demand in an action of trover is not made by the owner of the goods himſelf, and a refuſal on the ground that the party applying is unknown or not properly authoriſed, ſuch demand is not ſufficient in trover 85

U.

Use and Occupation.

Assumpsit will not lie for use and occupation where the premises are let for an unlawful purpose, or what is *contra bonos mores* page 13

Usury.

It is usury to lend money in the form of stock if that stock is rated above the market price at the time of transfer 11

If in discounting a bill the person doing it gives goods in part, if they are valued above their real value it is usury 46

W.

Wharfinger.

Wharfingers have a lien on goods brought to their wharfs for the balance of a general account 109

Witness.

Proof of an instrumentary witness's hand-writing sufficient, where he is abroad 2

It is therefore sufficient Proof of the execution of a bond or other instrument but not of an entry 2

A clerk in the post office whose business it is to detect the forgery of franks, how far he shall be a good witness to prove a forgery page 14

An objection to the competency of the witness may be made at any stage of the cause 37

A person whose name appears on a bill as indorsee, cannot, where the action is by the indorsee, be a witness to prove a property in the bill in himself in order to defeat the indorsee's action 85

A deed must always be proved by the subscribing witness, and the party himself cannot acknowledge it in court 89

On an indictment for perjury against the Defendant for what he swore as a witness in a cause: the party injured by such testimony and against whom the verdict went in consequence of it, is not a witness unless he has paid the debt and costs 97

A partner is an inadmissible witness to prove himself liable where the action is against another partner unless he has a release 103

FINIS.

582254

Money lent to play with - - - 18__

JSN JAE UNG
Cases argued and ruled at nisi
Stanford Law Library
3 6105 044 656 598